

Every Tradesman his Own Lawyer;

OR,

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A DIGEST OF THE LAW

CONCERNING

TRADE, COMMERCE, AND MANUFACTURES:

CONTAINING

THE SUBSTANCE OF ALL THE ACTS OF PARLIAMENT AND
ADJUDGED CASES IN EVERY BRANCH OF THOSE IMPOR-
TANT SUBJECTS, DOWN

TO THE END OF HILARY TERM, 1794.

INCLUDING

The Law and Custom of Merchants respecting Bank-Bills, Bills of Exchange, Promissory Notes, and Drafts: The whole Law of Bankrupts, from the Striking of the Docket to the Allowance of the Certificate, equally useful to the Assignee, Debtor, Creditor, and Bankrupt: Ample Instructions relative to Arbitrations and Awards: Laws for the Regulation of Auctioneers, including the two late remarkable Decisions before Lord Kenyon, in the Cases of Payne and Cove, and Ellice and Christie: The Law for and against Carriers, with some late important Determinations: Laws respecting Debtor and Creditor, Insurance, Buying and Selling, Usury, and such other Particulars as more immediately relate to those engaged in Trade, Commerce, and Manufactures.

By SYLVANUS HOWARD, ESQ. OF THE MIDDLE TEMPLE,
BARRISTER AT LAW.

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P R E F A C E.

IT is matter of astonishment, not only to the commercial world but to mankind in general, that a legal Directory, in matters of Trade and Commerce, has not hitherto been produced; as every trader is more or less regulated by a variety of statutes and adjudications. A work of this kind is now, however, more essentially necessary than it has ever been, from the number of additional Acts of Parliament, which almost annually pass, respecting the regulation of commercial affairs, or laying some new impost on certain commodities and manufactures. The man of business certainly stands in need of unerring information upon what so materially concerns him, to caution him against the danger, and direct him in the government of his commercial concerns.

No apology can be required by the Reader for furnishing him with the Law and Custom of Merchants, respecting Bank Bills, Bills of Exchange, Promissory Notes, and Drafts; especially as many singular and important decisions have lately taken place on several of those heads, of which those in the affairs of Livesy, Hargrave, and Co. form no uninteresting part.

On the Law of Bankrupts, it is presumed, the trader, (whether an assignee, debtor, creditor,

creditor, or bankrupt) will find ample information in this little volume, in every stage of the commission, from the striking of the docket, to the allowance of the certificate.

Arbitrations frequently prevent suits, and the enormous expences which inevitably attend them: great attention has therefore been directed to render that subject perfectly understood.

Several new statutes have passed the legislature for the regulation of Auctioneers, and some singular adjudications have taken place, in order to prevent their abuses: two, in particular, were given in the Court of King's-Bench, where Lord Kenyon then presided; the first declares, that a bidder may retract his bidding at any time before the hammer is down, and the other prohibits the Auctioneer from the use of exaggeration, but at his peril.

The Law for and against Carriers, including an important determination in the case of *Garside v. the Proprietors of the Trent and Mersey Navigation*, and that of *Burton v. Bolton*, will, it is presumed, be found highly useful.

Without dwelling upon the particular heads in this Treatise respecting Commercial Law, it may not be improper to add, that among them are contained, Laws respecting Debtor and Creditor, Insurance, Buying and Selling, Usury, and such other particulars as more immediately relate to Trade, Commerce, and Manufactures.

March 1794.

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General PRELIMINARY OBSERVATIONS, necessary to
be known and attended to by PERSONS IN BUSINESS.

BY the 14 G. 3. c. 42. No tender of payment in silver money, exceeding 25l. at one time, is a sufficient tender in law for more than its value by weight, at five shillings and two-pence per ounce. Legal tender of silver.

Only silver and gold coin are proper coin. Brass Copper: or copper are not within this denomination. 1 *Harw.* 195.

And no person is obliged to take in payment any money which is not lawful metal, that is, of silver and gold. 2 *Inst.* 577. Except for sums under sixpence. 1 *H. H.* 195.

But it has been recently decided, viz. in *Hilary* Bank term, 1790, that bank notes are money, and therefore a proper tender in payment, in the case of *Wright* against *Reed*. *Mingay* obtained a rule to shew annuity notes are money within annuity act, 17 Geo. 3. c. 26. why the annuity deeds in this case should not be delivered up to be cancelled, on the ground that the true consideration was not set forth in the memorial: part of the consideration was in money, and the rest in bank notes of the bank of *England*, whereas the whole consideration was described as money in the memorial. *Erskine* now shewed cause, and said that bank notes had always been considered as money; they are so in the case of tenders. Lord *Kenyon*, Ch. J. Bank notes are considered as money to many purposes:

poses : it was so held by lord *Mansfield* and the court, in *Miller v. Race*. *Asbursf.* J. The annuity act was passed for the purpose of guarding against fictitious considerations : but it cannot be contended that the payment in this case is within the mischief which that statute intended to remedy. Bank notes are money to all intents, and in this instance were taken as such. *Buller*, J. This court has never yet determined that a tender of bank notes is at all events a good tender : but if they have been offered, and no objection has been made on that account, this court has considered it to be a good tender ; and very properly so, for bank notes pass in the world as cash. In a case on the other side of the hall, the lord chancellor once suggested a doubt whether these kind of notes were money ; but here we have always been inclined to consider them as such, though the question has never yet been directly determined. By the court : Rule discharged. *Durnf. and East.* 3, 554.

Time of
making
tender.
More
than is
due.

If a tender of money be made at any time before the day expires, it is a good tender. *Co. Litt.* 202.

If a tender is made of more than is due, the person to whom it is tendered ought to take out what belongs to him. *5 Rep.* 115.

Tender in
bags.

If a tender be made in bags, without shewing or telling it, it is good, if it can be proved that there was the sum to be tendered. *Id.*

Church-
wardens
paying the
poor in
base
money.

By the 9 G. 3. c. 37. s. 7. If any church-warden or overseer of the poor, or any person authorized by him, shall make any payments to the poor in any base or counterfeit money ; one justice, on complaint, may summon the offender, and, on his non-appearance, or confession, or proof, by the oath of one witness, may adjudge him to forfeit not less than 10s. nor more than 20s. to be levied by distress, and applied to the use of any poor person or persons of the parish or place respectively, as the justice shall appoint.

Having
false
money in
possession.

If false or clipt money be found in a man's hands ; if he be suspicious, he may be arrested till he have

have found his warrant. 3 *Inst.* 18. *Hale's Pl.* 21.

1 *Haw.* 43.

Any person to whom any silver money shall be tendered, any piece whereof shall be diminished, otherwise than by reasonable wearing, or that by the stamp, impression, colour, or weight thereof, he shall suspect to be counterfeit, may cut, break, or deface such piece; and if any piece so cut, broken, or defaced, shall appear to be a counterfeit, the person tendering it shall bear the loss of it; but if it shall be found of due weight, and appears to be lawful money, the person who cut, broke, or defaced it, shall receive it at the rate it was coined for: and if any question arise, whether the piece so cut be counterfeit or not, it shall be determined by the next justice of the peace or chief magistrate in a corporation. 9 & 10 *W. c.* 21. *f.* 1.

False silver money, what to be done with.

And by the 13 *G. 3. c.* 71. If any person to whom any gold money shall be tendered, any piece whereof shall be diminished otherwise than by reasonable wearing; or that by the stamp, impression, colour, or weight thereof, he shall suspect to be counterfeit, he may cut, break, or deface such piece: and if any piece so cut, broken, or defaced, shall appear to have been diminished otherwise than by reasonable wearing, or counterfeit, the person tendering it shall bear the loss of it; but if it shall be of due weight, and appears to be lawful money, the person who cut, broke, or defaced it, shall receive it at the rate it was coined for: and if any question shall arise whether the piece so cut or defaced be counterfeit or diminished, it shall be determined by the mayor or other head officer in a corporation, and elsewhere by one justice inhabiting near where such tender was made.

False gold what to be done with.

If a man be unlawfully detained in any manner, it is false imprisonment, and considerable damages are recoverable; for the law very much favours liberty. 2 *Inst.* 46.

Unlawful detention is false imprisonment.

Adulterating wine.

By the 12 C. 2. c. 25. Adulteration of wine, either by the merchant or vintner, is punishable.

Stoppage.

A taylor, or other artificer, may detain a garment, &c. till payment is made for his labour.

Seducing artificers abroad.

Seducing and transporting artificers to go and settle abroad, is severely punishable, by 5 G. c. 27. 14 G. 3. c. 71. 21 G. 3. c. 37. 22 G. 3. c. 60. 23 G. 3. c. 13. and 25 G. 3. c. 67.

Bond.

If no time is limited in a bond for the payment of the money, it is due immediately, and payable on demand. 1 Brownl. 33.

Bond of 20 years standing.

And if a bond be of twenty years standing, and no demand be proved thereon, or good cause of so long forbearance shewn to the court: upon pleading *solvit ad diem*, it shall be intended paid. *Mod. Caf.* 22.

Brokers in London.

By the 6 Ann. c. 16. Every person acting as a broker, or employing any other to act under him as such, within the city of London, must be regularly admitted by the mayor and aldermen.

Combinations.

Combinations among victuallers, &c. to raise the price of provisions, are severely punishable. 2 & 3 Ed. 6. c. 15.

Or among tradesmen for the advance of their goods. 12 *Mod. Rep.* 248.

Or among artificers to raise the price of labour. 2 & 3 Ed. 6. c. 15.

A conspiracy of the journeymen in any trade is illegal, though the matter about which they conspired is lawful for them, or any of them to do, if they had not conspired to do it. 8 *Mod. Rep.* 10.

Compounding informations.

Compounding informations upon penal statutes, subjects the offender to a forfeiture of 10l. to stand in the pillory two hours, and to be for ever disabled to sue upon any popular or penal statute. 28 *Eliz.* c. 5.

Noise in the night.

A person making a great noise in the night, to the disturbance of the neighbourhood, is fineable.

1 *Stra.* 704.

An executor, or administrator, should bury the dead in a manner suitable to the estate he leaves; but if he be extravagant, it shall only be prejudicial to himself, not to the creditors or legatees. *1 Salk. 296. Godolph. p. 2. c. 26.* Executor burying the dead.

Funeral expences are allowed, previous to all other debts and charges. *3 Just. 102.*

In payment of the debts of the deceased, the executor or administrator must observe the rules of priority; otherwise, on a deficiency of assets, if he pays those of a lower degree first, he must answer the higher out of his own estate. *Wentw. Off. Ex. c. 12.* Priority of paying debts.

The order is,

1. Debts due to the king. *1 Ard. 129.*
2. Money due for poor's rates, and for letters to the post-office. *17 G. 2. c. 38. 9 Ann. c. 10.*
3. Debts of record, as judgments, statutes, and recognizances. *4 Rep. 60. Cro. Car. 363.*
4. Debts due on special contract; as for rent upon bonds, covenants, and the like. *Wentw. Off. Ex. c. 12.*

5. Debts on simple contracts; as promissory notes, verbal promises, servants' wages, &c. *Id.*

If a fire happens in a street, a man may justify pulling down the wall or house of another person to prevent its spreading. *Bac. Elem. R. 5.* In case of fire.

An inn-keeper is not bound to receive a horse, unless the master lodge there, nor is he bound to furnish his guests with provisions unless paid for beforehand, for he need not trust. *1 Haw. 225.* Inn-keepers.

By the *5 Eliz. c. 4.* Such labourers and artificers as leave or desert their work unfinished, are punishable by the justices. Leaving work unfinished.

By the custom of London, a tenant at will, under the yearly rent of forty shillings, shall have a quarter's warning; and paying above forty shillings, shall have half-a-year's warning. *2 Siderf. 20.* Warning in London.

If a man borrow, or hire, a horse, or cart, or any other thing that may be used and delivered again, and use it for the purpose, and in the manner Borrowing or hiring.

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ner intended, and it is injured or destroyed without his default, the owner shall bear the loss; but if it is used otherwise than according to the lending, then the borrower or hirer shall be chargeable. *Noy's Max. 91.*

Limita-
tion of
actions.

By the 21 *Jac. 1. c. 16.* Actions upon the case, except for slander; actions of account, except where it is an account *current* between merchants; actions of debt, except upon bond; actions of detinue, trover, trespass, and replevin, must be brought within *six years* of the cause of action; otherwise the plaintiff cannot recover.

Actions of assault, battery, wounding, or imprisonment, must be brought within *four years.* *Id.*

Actions for words spoken in defamation, must be brought within *two years.* *Id.*

But an acknowledgment of the debt, after the commencement of an action, takes it out of the statute of limitations. *2 Burr. 1099.*

Where a person has expended his own money for the use of another, at his request, the law implies a promise of re-payment. *Carth. 446.*

What is a
month in
law.

A month in law is a lunar month of twenty-eight days, unless otherwise expressed; therefore a lease for *twelve months* is only forty-eight weeks; but a lease for a *twelvemonth* is good for the whole year. *6 Rep. 62. 3 Burr. 1455.*

Wills.

Written wills, where there is no devise of lands, need no witness of their publication; though the safer way is to have witnesses. *Godolp. p. 1. c. 21. Gilb. Rep. 260.*

Will
without
signing.

A testament of chattels, or personal property, written in the testator's own hand, though it has neither his name nor his seal to it, nor witnesses present at its publication, is good; provided the handwriting be clearly and sufficiently proved. *Id.*

Leaving
a shilling.

The necessity of leaving the heir a shilling, or some express legacy, is a groundless vulgar error. *2 Blackst. Com. 503.*

Witness
to declare
the whole
truth.

As every witness swears to depose the *whole* truth, he is not to conceal any part of what he knows, whether

whether he be interrogated to that point or not.

3 *Blackst. Com.* 372.

Books of account, or shop-books, may be given in evidence, if the servant who was accustomed to make the entries is dead; but his hand-writing must be proved. 2 *Salk.* 690. 1 *Ld. Raym.* 732. What books are evidence.

If a porter who carries out goods for his master, enters the delivery in a book and signs it, and afterwards dies; upon proof of his hand-writing the book shall be admitted good evidence of delivery. Porter signing the book.

1 *Salk.* 285.

But by the 7 *J. 1. c.* 12. These proofs are only admitted in such transactions as happened within one year of the action; except in cases between merchant and merchant, merchant and tradesman, and tradesman and tradesman, for any thing within the compass of their respective trades and merchandize.

But if the servant be living, he may only have recourse to shop-books, &c. to refresh his memory.

3 *Blackst. Com.* 368.

Though a shop-book is not evidence for a tradesman, it is good evidence against him, or for a stranger. 1 *Ld. Raym.* 745.

By the 26 *G. 3. c.* 57. Bonds and deeds executed in the East-Indies, when the subscribing witnesses reside there, are made evidence in Great Britain, on proof of the hand-writing of the parties and of the witnesses. Bonds executed in the East Indies.

Comparison of hand-writings is evidence in civil, but not in criminal cases. *Gilb. Law. of Ev.* 54. Comparison of hands.

By the 31 *G. 2. c.* 10. No seaman on board any of his majesty's ships, can be arrested for any debt, unless it be shewn to amount to twenty pounds. Arresting seamen.

But by the mutiny acts, a soldier may be arrested for a debt of ten pounds.

Suitors, witnesses, and other persons necessarily attending any courts of record upon business, are not to be arrested during their actual attendance; which includes their necessary coming and returning. 3 *Blackst. Com.* 289. Suitors, &c. attending courts.

If

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Contingent legacy.

If a contingent legacy be left to any one, as *when* he attains, or *if* he attains the age of twenty-one years, and he dies before that time, it is a lapsed legacy. 1 Burr. 327.

A legacy *to be paid* when he attains the age of twenty-one years, is a vested legacy; and if he dies before that time, his representatives shall have it. *Id.* But this is restricted to personal estate.

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Apprentices.

AN apprentice must be retained by the name of an apprentice expressly, otherwise he is no apprentice, though he be bound. *Dalt. c. 58.*

A person cannot be bound an apprentice without deed. *1 Salk. 68.*

And by the 5 of *Eliz. c. 4. f. 25.* an apprentice must be bound by deed indented. Binding to be by deed, and such deed indented.

In the case of *Smith and Birch, M. 1 G 2.* an action was brought against the defendant for enticing away, and detaining the plaintiff's apprentice. Upon evidence it appeared, though the written instrument began with the words *This Indenture, &c.* the parchment in fact was not indented, but was a deed poll; the plaintiff was therefore non-suited. *1. Sess. Ca. 222.*

But, by the 31 G. 2. c. 11. the apprentice may gain a settlement under such writing, though it be not indented.

And, as an apprentice can only be bound by deed, so is it necessary, according to the custom of some places, that such deed or indenture be inrolled: As in London, if the indentures be not inrolled before the chamberlain within a year, upon a petition to the mayor and aldermen, &c. a *scire facias* shall issue to the master, to shew cause why not inrolled; and, if it was through the master's default, In London such deed must be inrolled.

the apprentice may sue out his indentures, and be discharged; otherwise, if through the fault of the apprentice; as, if he would not come and present himself before the chamberlain, &c. for it cannot be inrolled, unless the apprentice be in court, and acknowledges it. 2 *Rol. Rep.* 405. 1 *Mod.* 271.

But it has been held, that this custom does not extend to one bound apprentice to a waterman, under 21 years of age; for the company of watermen are but a voluntary society, and being free of that does not make them free of London. 6 *Mod.* 69.

All indentures to be according to *stat.* 5 *Eliz.*

By the 5 *Eliz. c.* 4. *f.* 39, 41. All indentures, covenants, promises, and bargains for having or taking apprentices, otherwise than by the statute of 5 *Eliz.* shall be clearly void in law to all intents and purposes, and every person that shall take any apprentice, contrary to the said act, shall forfeit 10*l.* half to the king, and half to him who shall sue in the sessions, or other court of record; or, if it is in a town corporate, then to the use of such town as by the charter.

Stamp Duty.

By the several stamp-acts, the binding (except of parish apprentices) shall be on a 6*s.* stamp; and the same shall not be given in evidence in any court till it be stamped, and the duty paid.

Additional.

And by the 8 *Ann. c.* 9. *f.* 32. besides such stamps and duties, the duty of 6*d.* shall be paid for every 20*s.* of every sum of 50*l.* or under; and 1*s.* for every 20*s.* of every sum above 50*l.* given with any apprentice; and in the same proportion for greater or lesser sums.

And by the same act, *f.* 45, if any thing, not being money, shall be given with such apprentice, the duties shall be estimated from the value thereof.

But this shall not extend to any parish apprentice, or any apprentice put out by a public charity. *f.* 40.

And if the full sum shall not be inserted in the indenture in words at length, and if it shall not bear date on the day of the execution thereof, the master shall

shall forfeit double; half to the king, and half with full costs to him who shall sue. *f. 35.*

Such indentures, within the bills of mortality, shall be brought to the head office to be stamped, and the duty thereon shall be paid within one month after date. *f. 36.*

And in other places the said indentures shall be brought either to the head office within the bills of mortality, or to a collector of the stamp duties out of the said limits, in two months after date, and the duties thereupon shall be paid, and the indenture stamped, if it be at the head office; otherwise such collector shall indorse on the indenture a receipt for the duties in words at length, and subscribe his name thereto. *f. 37.*

Inden-
tures
where to
be stamp-
ed in the
bills, and
where
without.

Within fifty miles of the limits of the bills of mortality, the indenture shall within three months after date, and elsewhere within six months, be brought to the head office to be stamped. *f. 38.*

And all such indentures not having therein inserted the full sum directly or indirectly given, and whereupon the duties shall not be paid, or which shall not be stamped within the time limited, shall be void.

f. 39.

Also by the same statute, *f. 43.* no such indenture shall be given in evidence, unless the party on whose behalf the same shall be given in evidence, do first make oath, that, to the best of his knowledge, the sum therein inserted was really and truly all that was directly or indirectly to be given with such apprenticeship.

Oath to
be taken
of the full
sum or
value
given.

And by the 9 *Ann. c. 21. f. 66.* the master who shall neglect to pay the duties within the time limited, shall forfeit 50*l.* half to the king, and half with full costs to him who shall sue.

Forfeit-
ure on
non-pay-
ment of
duty.

Further, if the master shall neglect to pay the same, as aforesaid, he shall, besides all other penalties, forfeit double duty. 18 *G. 2. c. 22. f. 23. 24.*

But if any master who has forfeited the double duty, shall pay the same, and tender the indenture

to be stamped, within two years after the determination of the apprenticeship, and before suit has been commenced for the penalties, the indenture shall be valid, and the penalties discharged. 20 G. 2. c. 45.

§. 5.

Further
direc-
tions on
neglect of
payment.

And by the same statute, §. 6. and 7. if, after the master shall have forfeited the double duty, the apprentice shall, in the presence of, or by writing under his hand and seal, in the presence of one witness, require his master to pay the same, and the master shall not pay the same in three months, and such apprentice shall at any time within two years after the determination of his apprenticeship, pay the double duty, he may in three months after such payment, demand of his master double the sum contracted for in the indenture, and, if not paid in three months after, may recover the same by action at law, with full costs. And the apprentice, immediately after payment of the said double duties (if his apprenticeship shall not be then expired) and signifying by writing under his hand, that he desires to be discharged from his apprenticeship, shall be discharged accordingly, and shall have the same benefit of the time he has served, as he would have had in case he had been assigned, or turned over to a new master.

Also where any prosecution shall be commenced against the master for the penalties, if the apprentice shall pay the double duty, at any time within two years after the end of his apprenticeship, he may thereupon exercise his trade, and the indenture shall be valid, and may be given in evidence. §. 8.

Cham-
berlain,
&c. to
enter
names of
appren-
tices, &c.
in a book.

And by the 5 G. 3. c. 46. it is enacted, that every chamberlain and other proper officer of every city and corporate town, and company, where any clerk, apprentice, or servant, obtains his freedom by servitude, shall enter in a book to be kept for that purpose, the names of all such clerks, apprentices, or servants, as shall be put out within the jurisdiction of such city, &c. and the names and places of abode
of

of the masters or mistresses, and of the sums of money given or contracted for, and the trade or profession which they are to learn; and the date of the indentures; on pain of 20*l.* half to the king, and half to him who shall sue in any court of record, with full costs. *f.* 18. 41.

And by the same act, *f.* 19. all printed indentures shall have the following memorandum printed under the same: "The indenture, covenant, article, or contract, must bear date the day it is executed; and what money, or other thing, is given or contracted for with the clerk or apprentice, must be inserted in words at length, and the duty paid to the stamp-office, if in *London*, or within the weekly bills of mortality, within one month after the execution; and if in the country, and out of the said bills of mortality, within two months, to a distributor of the stamps or his substitute; otherwise the indenture will be void, the master or mistress forfeit 50*l.* and another penalty, and the apprentice be disabled to follow his trade, or to be made free." And any printer, stationer, or other person, who shall sell or cause to be sold any such indenture, not having such memorandum printed under the same, shall forfeit 10*l.* in like manner.

Memorandum
to be inserted
under indentures.

N.B. For relief of those who may have omitted to pay the duties above-mentioned, or to insert the said sums in words at full length, an indemnifying clause is inserted in some act of parliament almost every year; extending the time for rendering obedience to several penal clauses.

By the several stamp acts, instead of a stamp duty of 6*s.* which is required on other indentures of apprenticeship, the indenture for binding a poor apprentice must be on a fixpenny stamped piece of paper or parchment; and such indenture is exempted from the additional stamps and duties for money given with the apprentice.

Stamp
duty 6*d.*
on poor
apprentices.

By the custom of *London*, a freeman of *London* may turn over his apprentice to another master being a freeman;

Custom
of *London*.

freeman ; and such second master shall have the same benefit of the apprentice's covenants, as the apprentice shall of the covenants on the side of the master, as if he had been originally bound to him. *March. 3. 1 Keb. 250.*

Justices
may dis-
charge
apprenti-
ces in cer-
tain cases.

The justices of the peace may discharge an apprentice, not only on default of the master, but also on his own default ; but it has been holden, that their jurisdiction herein extends only to such apprentices as were bound to trades within the statute, and were compellable by them to serve ; for that in such case it is but reasonable that the contracts, which were made by their authority, should be dissolved by the same power ; but that they cannot discharge any voluntary agreements made between the parties. *Salk. 471.*

Money
refunded
on a
bank-
ruptcy.

In the chancery, *ex parte Sandby. Jan. 2. 1745,* the petition set forth that the petitioner was on the tenth of January, 1744, bound apprentice for seven years to *Ward* a bookseller at York, and the sum of 80*l.* was given with him ; but, as *Ward* was declared a bankrupt in July following, and quitted the business of a bookseller, the petitioner prayed, that on deducting 10*l.* out of the 80*l.* for his board with the bankrupt during the six months he lived with him, the assignees should be ordered to pay him 70*l.* out of the effects of the bankrupt : but the lord chancellor *Hardwicke*, after some deliberation, ordered the petitioner to be admitted only as a creditor for 70*l.* *1 Atkyns. 149.*

Refund-
ing mo-
ney.

An apprentice being ill used brought his bill : it was decreed that the master should deliver up his indentures, and a bond of 100*l.* for his honesty, and repay part of the money given with the apprentice, with full costs ; the apprentice having before had a verdict in the lord mayor's court, and the master ordered to provide a new master, which he refused to do. *Fin. Rep. 124.*

An apothecary turned away his apprentice for negligence and misdemeanors laid to his charge ; but the

the court decreed the master to refund 30*l.* of the money he had with him; and the rather because the indentures were not inrolled, so as the matter was not properly cognizable before the chamberlain of London. 2 *Vern.* 64.

It seems pretty clear that when an apprentice quits his master's service, without consent, that the master is entitled to his earnings during such his absence. In the case of *Hill and Allen*, in Chancery, Feb. 3, 1747, the bill was by an apprentice, who, against his master's consent, quitted his service of a shipwright before his time was out, and went on board a privateer, which took a considerable prize: his share amounting to 1200*l.* the master claimed it. By lord Hardwicke: In general, the master is entitled to all that the apprentice shall earn; consequently if he runs away, and goes to a different business, the master is entitled at law to all his earnings, and in this case, his lordship said there was nothing in equity to relieve. But he said he would send the case to be tried at law, unless they would agree to compound the matter, which he recommended to them, and thought, as the boy's share of the prize was so very large, the balance ought to be in his favour. And the master agreed to accept 450*l.* 1 *Vezey*, 83.

It is also provided by the 6 G. 3. c. 25. that, if any apprentice shall absent himself from his master's service, before the expiration of his apprenticeship, he shall whenever it shall afterwards be required (if within the space of seven years after the expiration of his term) be compelled to serve such master, for so long time as he shall have absented himself, or make satisfaction to his master for the loss he has sustained by such absence: and, on refusal to serve or make satisfaction, the master may complain upon oath to one justice where he shall reside, who shall issue his warrant for apprehending such apprentice. And such justice, on hearing the complaint, may determine what satisfaction shall be made to such master

Master entitled to the apprentice's earnings.

Apprentice absented himself shall make up the loss sustained by his absence.

Apprentices.

master by the apprentice. And if such apprentice shall not give security to make satisfaction according to such determination, such justice may commit him to the house of correction for any time not exceeding three months.

Appren-
tice em-
bezzel-
ling or
stealing
goods.

By the 21 H. 8. c. 7. if any servant to whom any goods shall by his master or mistress be delivered to be kept, shall go away therewith, to the intent to steal the same; or, being in his master or mistress's service, without his or her assent shall embezzle or otherwise convert the same to his own use, with like purpose to steal it, if the same be of the value of 40s. or above, he shall be guilty of felony: but this not to extend to apprentices.

But yet a servant may be guilty of felony at common law, if he take the goods of his master feloniously, nay, though they be goods under his charge, as a shepherd, butler, and the like; and for this he may be indicted at this day as a felon at common law: and of this felony at common law, an apprentice or servant under the age of 18 years, may be guilty and indicted thereof. 1 H. H. 667.

And therefore though this statute exempt an apprentice, or servant under 18, from the pain of felony enacted *de novo* by this statute, namely, where goods are actually delivered to him, yet it leaves him in the same condition as to any felony at common law, as if he were not excepted; and therefore if a butler or shepherd, under the age of 18 years, or if an apprentice, take away his master's goods feloniously, without an actual delivery, though they are under the value of 40s. he is indictable of felony at common law. 1 H. H. 667, 668.

Indul-
gence to
apprenti-
ces under
15 years
of age.

By the 12 Ann. st. 1. c. 7. every person who shall steal goods to the value of 40s. out of any dwelling-house or out-house thereto belonging, though such house, &c. be not broken open, and though no person be therein, shall be guilty of felony without benefit of clergy. But this not to extend to apprentices under fifteen years of age robbing their masters.

But

But if they are fifteen years of age, they shall be guilty as other persons. 1 H. 667.

A master may lawfully correct and chastise his apprentice, for neglect or other misbehaviour, so it be done with moderation; though it does not seem to be lawful for the master or mistress to beat any other servant of full age. Lamb. 127. 1 Black. 428.

In the case of *Soam* against *Bowdon* and *Eyles*, M. 30. C. 2. the master received with the apprentice 250*l.* and died within two years, the apprentice having, during that time, been employed only in inferior affairs. It was decreed, after debts on specialties were paid, that the executors repay the 250*l.* as a debt due on simple contract; deducting after the rate of 20*l.* a year for the maintenance of the apprentice, during the time he lived with his master. Fin. Rep. 396.

Money refunded on the master's death.

A. placed his son clerk to an attorney, and gave with him 120*l.* the master agreeing to return 60*l.* of the money if he died within a year: the master was sick at the time, and of that sickness died within three weeks. Jefferies, Ch. J. decreed 100 guineas to be paid back to A. Vern. Rep. 460. Pl. 437. In the case of *Newton* and *Rouse*.

If a person knows that an apprentice ran away from his master, and he keeps and employs him, the proper remedy is to bring an action for so much money paid to the plaintiff's apprentice, in wrong of the plaintiff: per *Barnard*, Ch. J. Rep. in B. R. E. 2. G. 2.

By the custom of London, no person whatsoever, not being free of the city of London, shall by any colour, way, or mean whatsoever, directly or indirectly, by himself or any other, keep any shop, or any other place whatsoever, inward or outward, for shew or putting to sale of any wares or merchandizes whatsoever, by way of retail, or use any trade, occupation, mystery, or hand-craft for hire, gain, or sale, within that city. 8 Rip. 124.

Custom of London.

Reasons
for serv-
ing an ap-
prentice-
ship.

At common law any person might follow what lawful trade he pleased; which, in many instances, was found inconvenient and detrimental to the public, as many persons exercised trades in which they had little or no skill or experience; therefore to prevent such mischief, and the better to train up and enure persons to labour and industry from their youth, and thereby make them more skilful and expert, the *statute of 5 Eliz.* was made. 11 Co. 53. Skin. 133.

Of serv-
ing seven
years.

By the statute above-mentioned, c. 4. s. 31. it is enacted, that it shall not be lawful for any person or persons to set up, occupy, use, or exercise any craft, mystery, or occupation, now used or occupied within the realm of *England* or *Wales*, except he shall have been brought up therein seven years at the least as an apprentice by this statute; nor to set any person on work in such mystery, art, or occupation, except he shall have been apprentice as aforesaid; or else, having served as an apprentice as aforesaid, shall become a journeyman, or hired by the year; on pain of forfeiting 40s. a month, half to the king, and half to him who shall sue, in the sessions, or other court of record: or if it is in a town corporate, then to be disposed of as other fines by the charter.

Formerly it was said the restraint shall not extend further than the words expressly direct, and therefore that new arts and mysteries are not within the statute. 1 Roll. Rep. 10. 1 Vent. 326, 346. But it has been since resolved otherwise. 2 Ld. Raym. 1410. 1 St. 663.

Nor to
officers,
mariners,
&c.

It is also enacted by 3 G. 3. c. 8. that all officers, mariners, and soldiers, who have been employed in his majesty's service, and not deserted, may exercise such trades as they are apt for, in any town or place.

And by 6 and 7 W. c. 17. s. 12. any apprentice who shall discover two offenders guilty of coining, so as they be convicted, shall be deemed a freeman, and may exercise his trade as if he had served out his time.

The statute says no person shall *set up, occupy, &c.* Follow-
except he shall have been brought up therein seven years; ing a
 and it has been resolved that there is no occasion for trade
 any actual binding; but that the following a trade seven
 for seven years, is a sufficient qualification within years suf-
 the statute. 1 *Salk.* 67. 2 *Salk.* 613. ficient.

So where an action was brought on this statute, and, upon not guilty pleaded, it appeared that the defendant's father carried on the same trade, and that the defendant for several years had been employed by his father therein; and it was held that he might lawfully use that trade, for that he had been a kind of apprentice to it, which was sufficient to satisfy the statute. *Carth.* 163.

Persons not having served an apprenticeship, and following a trade, either as master or servant, without any effectual prosecution for seven years, may continue to follow it without molestation. 2 *Ld. Raym.* 1179. 2 *Wils.* 168.

And in the case of *Wallen and Holton*, at the assizes for Berkshire, T. 33. G. 2. On an information against the defendant for exercising the trade of a baker contrary to the statute, it appeared in evidence that he had followed it twelve years, but never had been an apprentice, nor served with any person as such. On a case reserved, baron Adams, before whom it was tried, consulted the eleven judges; who all joined with him in opinion, that exercising a trade seven years, without any prosecution with effect, was a sufficient qualification. *Blackstone's Rep.* 233.

So if a man lives with another, who uses a trade which the other is not qualified for using, seven years, he may set up the trade as well as if he had lived with one ever so well qualified. *Cas. in L. and Eq.* 71.

M. 26 C. 2 K. and *Moor*, the defendant was indicted for using the trade of a weaver, not having served as an apprentice seven years: the evidence was, he served six as an apprentice, and had since, as jour-

neyman in the same trade, worked above that time; by the court; the serving of seven years is sufficient either way; and the defendant was found not guilty.

3 *Heb.* 400.

It has been held, that an indictment against two or more, for following a joint trade without having served a seven years apprenticeship required by the statute, is not good, as it would be absurd to charge them jointly, because the offence of each defendant arises from the defect peculiar to himself. 1 *Rol. Abr.* 8.

A person not brought up to the trade may be admitted a partner, provided

But a person not brought up to the trade may engage in partnership with one who has served an apprenticeship in it, provided that he only shares in the profit or loss of the business, and does not actually exercise the trade. As in the case of *Reynard and Chase*, *M.* 30. *G.* 2.

Uninterrupted exercise of any trade for seven years a sufficient qualification.

In the case of *French and Adams*, *T.* 3 *G.* 3. it was determined by the court, and all the judges of England at a meeting resolved, that if any man, as a master, had exercised and followed any trade, without interruption or impediment for the term of seven years, he was not liable to be sued or prosecuted on the statute of 5 *Eliz.* Also if a man has followed two or more different trades for the term of seven years or more, he shall not be liable to be prosecuted on this statute. 2 *Wilson*, 168.

A person may use several trades.

And it has long been held that this statute does not restrain any man from using several trades, so as he had been apprentice to all; wherefore it indemnifies all petty chapmen in little towns and villages, because their masters kept the same mixed trades there before. *Carth.* 163.

Of Arbitrations and Awards.

AN arbitrator is a private extraordinary judge between party and party, chosen by their mutual consents to determine controversies between them. Who is an arbitrator. And *arbitrators* are so called because they have an *arbitrary* power; for, if they observe the submission, and keep within due bounds, their sentences are definitive, from which there lies no appeal. West. Symb. P. 2. S. 21. 1 Rol. Abr.

Arbitrators, being chosen by the parties, are not tied to such formalities of law as judges in other cases are; and yet they have as great power as other judges to determine the matters in variance; but their determination must be certain, and it must be according to the express condition of the bond by which the parties submit themselves to their judgment. 1 Nesf. Abr. 234. Dyer 356. Arbitrators award final.

The chancery will not give relief against the award of the arbitrators, except it be for corruption, &c. and where their award is strictly binding by the rules of law, the court of equity can decree a performance. Chanc. Rep. 279. 1 Vern. 24. Except where corruption appears.

Persons who cannot contract, cannot submit to arbitration; therefore *femes covert*, persons compelled by threats and imprisonment, persons professed in religion, cannot submit. Lat. b 27. Of submitting to arbitration.

The husband may submit the chattels he has in right of his wife to an award, for he may dispose of them. Style 351.

If the husband submit to arbitration the chattels the wife has as executrix or administratrix, this shall bind the wife, because the wife cannot personate any one without the husband, during coverture. 21 H. 7, c. 29. Cro. Jac. 447.

If an infant submit to arbitration, he may execute or avoid it at his election, as he may all his other contracts.

contracts. 13 H. 4. 12. 10 H. 6. 26. 5 H. 7. 16.
1 Rol. Abr. 730.

Persons attainted or outlawed cannot submit to arbitration, for they have no property, and cannot by the law controvert any thing. 3 H. 6. 26. 5 H. 7. 16.

If one party, and the deputy or attorney of the other party submit to an award, this is held good; for the act of my deputy is my own act. Dyer 21.
1 Rol. Abr. 244.

Whomay
be arbi-
trators.

Arbitrators are persons indifferently chosen, to determine the matters in controversy, according to their own minds, whether they are matters of law or fact: infants, persons excommunicate, outlawed, &c. may be arbitrators; for every person must use his own discretion in the choice of his judges, and being at liberty to choose whom he likes best, cannot afterwards object the want of honesty or understanding to them, or that they have not done him justice. West. Symb. 2 part, f. 27.

Objects
of arbi-
tration.

All matters of controversy, either of fact, or of a right to things and actions personal and uncertain, may be submitted to arbitration. 9 Co. 78.

So a debt on specialty or record, though certain, may be submitted and transferred by an award, amongst other things, but not by itself. 1 Lev. 192.

But freehold, or inheritance of lands, cannot be determined by arbitrament; for a freehold is not transferrable from one to another, without livery and seisin. Yet, if there be a submission concerning the right, title, or possession of lands or tenements, and the parties enter into mutual bonds, to stand to the award made relating to them, they forfeit their bonds unless they obey it. 1 Rol. Abr. 242, 244.

If a man be bound to stand to an award, and the arbitrators make an award that land shall be conveyed; if the party refuses conveyance, he forfeits the obligation. 1 Rol. Abr.

If an award be that a person shall pay so much in satisfaction of a specialty; though the specialty is not thereby discharged, yet, if he commences an action

action on the specialty afterwards, he forfeits his obligation. 1 *Rol. Abr.* 242.

An annuity is not determinable by award, being considered in the nature of a freehold, and therefore cannot pass without the deed of the party. 1 *Rol. Abr.* 266.

Neither can *partition* be made by award, for a freehold cannot pass without livery or seisin. 1 *Rol. Abr.* 242.

Leases for years being chattels real, doubts have arisen whether they could be transferred by award; therefore, when the controversy relates to these, it seems safest that the parties be bound in mutual obligations to perform the award; and then if the arbitrators award that one shall assign, transfer, &c. the lease to the other, if he refuses, he forfeits his obligation. 1 *Rol. Abr.* 242. 1 *Bac. Abr.* Arbitrament.

Debts on arrearages of accounts before auditors shall not be discharged by award; because it appears of record, and must be discharged by matters of as high a nature. *Id.*

Debts due by specialty cannot be discharged by a bare award; but, if the submission was by bond, the award would be a good bar; for one specialty may be dissolved by another. *Id.*

A certain fixed debt cannot be the subject of award, the design of an arbitration being to reduce uncertain debts and duties to a certainty. *Cro. Jac.* 99. 1 *Bac. Abr.* Arbitrament. A fixed debt not subject to award,

Causes criminal are not determinable by arbitration, because the perpetrators of crimes should be made known and punished for the common good; and the king in such cases is a party, for whom the other parties cannot undertake. 1 *Bac. Abr.* Arbitrament. nor criminal causes.

But if the party injured proceeds by way of action, as he may in assaults and batteries, libels and the like, the damages may be submitted to arbitration; for in such case, the action is for himself and not for the king. *Comp. Arbitrator* 28. Assaults, libels, &c. are.

Matri-

Matrimonial causes are not.

Matrimonial causes, or matters relating to the contract or dissolution of marriage, cannot be submitted to arbitration. 1 *Rol. Abr.* 252.

But the damages a person may have sustained by a promise of marriage, or any thing relating to a marriage portion, may be submitted. 16 *Ed.* 4. 2.

All chattels personal, and personal actions are.

It is held clearly, that all chattels personal, and personal actions, such as trespass, conspiracy, &c. may be determined by arbitration; and the right transferred by a bare award, though the submission were not by deed; for these being transferable by the party himself, without any solemnity, whatever the parties themselves could do, may be done by the arbitrators, who are their substitutes, and stand in their place: and if on these submissions, without deed, the arbitrators award one party a sum certain, he may bring an action of debt for it; but, if the award be of doing some other thing, which is beneficial to him, he must have his action on the case. 9 *Co.* 78. 1 *Rol. Abr.* 242.

Various kinds of submission.

The submission to arbitration is the authority given by the parties in controversy to the arbitrators, to determine and end their grievances; and this being a contract or agreement, must not be taken strictly, but largely, and according to the intent of the parties submitted. *West. Symb.* part 2. s. 1, 2.

By words

A submission by words is good, and the party in whose favour the award is made, has a remedy to enforce the performance of it; yet it is not expedient that any submission should be by *parol*, because the party may revoke it at pleasure, at any time before the award is made, and that by *word* likewise; and the judges will rarely enforce the performance of an award, when either the submission or the award is by *parol*, because it lays so great a foundation for perjury. *Compl. Arb.* 21.

By covenant.

Submission may also be by *covenant*; but this method is not practised; for though it contains the same certainly with a bond, yet the method of suing on

on a covenant is different, and more difficult than in suing on a bond. *Compl. Arb.* 7, 4. 6.

A submission may also be made a *rule of court*, by rule of court. pursuant to the statute of 9 & 10 *W. c.* 15. in which it is enacted, That it shall be lawful for all merchants and traders, and others desirous to end any controversy, suit, or quarrel (for which there is no other remedy but by personal action, or suit in equity) by arbitration, to agree that their submission of the suit to the award or umpirage of any person or persons should be made a rule of any of his majesty's courts of record which the parties shall choose, and to insert such their agreement in their submission, or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons : which agreement being so made and inserted in their submission or promise, or condition of their respective bonds, shall or may, on producing any affidavit thereof made by the witnesses thereunto, or any of them, in the court of which the same is agreed to be made a rule, and reading and filing the said affidavit in court, be entered of record in such court ; and a rule shall thereupon be made by the said court, that the parties shall submit to, and finally be concluded by the arbitration or umpirage which shall be made concerning them, by the arbitrators or umpire, pursuant to such submission : and in case of disobedience to such arbitration or umpirage, the party refusing or neglecting to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court ; and the court, on motion, shall issue process accordingly ; which process shall not be stopped or delayed in its execution by any order, rule, command, or process of any other court, either of law or equity, unless it shall be made appear on oath to such court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage, was procured

E by

by corruption, or other undue means. And any arbitration or umpirage, procured by corruption or other undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity; so as complaint of such corruption, or undue practice, be made in the court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made and published to the parties.

This method is the most expeditious: a counsel may move in any of the courts to have it made a rule, which is granted of course; and the party becomes liable to the same penalties that he would be for disobeying any other rule of court. *Compl. Arb. 6, 74.*

And by
bond.

Submission may likewise be by *bond*; in which case each party must give the other a bond, both which must contain exactly the same words, only changing the names of the parties. And the penalty of the bond should equal or rather exceed the value of the thing submitted; that the party may rather be induced to abide by the award, than forfeit his obligation. *Id. 46.*

In some instances indeed the submission by bond exceeds a submission by rule of court; for an award made pursuant to bonds of submission, may bind the parties executors; but if the party who refuses to perform an award made pursuant to a rule of court, shall die, the act of parliament directing that the prosecution shall be carried on by attachment, the remedy being lost, the award is also lost. *Id. 34.*

Also by
bond and
rule of
court.

Sometimes the submission is both by *bond* and *rule of court*, by adding the consent of parties at the bottom of the condition of the bond. This is esteemed the best way, as the party may then proceed which way he pleases: and it is said he may proceed both ways: that is, on the bond, and also have an attachment for the contempt. *1 Sdk. 73.*

It

It is now the usual practice to insert in the submission, a clause, that no bill in equity shall be filed against the arbitrators : which restriction will be a bar against such bill being brought. As in the case of *Lingood and Croucher*, 2 *Atkyns*. 395.

If there be a submission to an award, it may be revoked before the award made. 1 *Sid.* 281.

If two submit on one part, and one on the other, one of the two may revoke without the other. 1 *Rol. Abr.* 331.

If the submission be by deed it is of its own nature countermandable, though made irrevokable by the express words of the deed ; for the arbitrators being constituted and put in the place of the parties, by their consent, to act for them, they can no longer act than they have such consent. 8 *Co.* 82. 1 *Brownl.* 62.

Submission may be revoked.

If there be a submission by a feme sole, who marries before an award be made, it will be a revocation. So if the woman and another person submit to one part, and the woman marries, it will be a revocation as to that other person also. 1 *Rol. Abr.* 331.

But if there be a submission, and a bond is given to stand to an award, if the obligor revoke he forfeits his bond ; for he has broken the words of the condition, which are, that he shall stand to and abide the reward. 8 *Co.* 82. 1 *Rol. Abr.* 331.

If a submission be revoked, it is of no avail till notice of the revocation to the arbiters. 1 *Rol. Abr.* 331.

And if the submission was by bond, the revocation must be in writing. 8 *Co.* 82.

If the submission be made a rule of court, pursuant to the statute of the 9 and 10. *W. c.* 15. and either of the parties revokes, the court will grant an attachment. *Comp. Ab.* 82.

But not if by a rule of court.

A submission by *word* may be revoked at pleasure, and the party revoking forfeits nothing ; but it will be necessary for him to give notice of the revocation,

Of Arbitrations and Awards.

though it need not be in writing, and such notice must be to the arbitrators themselves. 8 Co. 82.

What is
meant by
award.

Award is the judgment and arbitration of one or more persons, at the request of two parties who are at variance, for ending the matter in dispute without public authority; and may be called an award, because it is imposed on both parties to be observed by them. *Spelman.*

Stamp.

By the 23 G. 3. c. 58. it is enacted that every award in writing shall be on a 5s. stamp.

10/

And it is highly convenient that the award be in writing, and so to be mentioned in the submission. *Compl. Arb.* 34.

What
consti-
tutes a
good
award.

Arbitrators cannot enjoin on oath to the witnesses, not being authorised so to do by law. *Burn.* 1. 131.

In making an award, five things should be observed. First, that it be according to the very *submission*, in respect to the persons and the things submitted. Secondly, it ought to be *equal*, and not on one side only; for it must appoint either party to give or do something beneficial or advantageous. Thirdly, the performance of the award must be *possible* and *lawful*. Fourthly, there must be a *means* by law to attain to the thing awarded; and this is chiefly meant where submission is without bond. Fifthly, it ought to be *certain* and *final*, and make an end of all controversies submitted; or if it is good only in reference to part of the things submitted, it must be *final* as to that part, or it will be void. 10 Co. 57. *Dyer* 242. 1 *Rol. Abr.* 243, 244, &c.

These things being observed, an award shall not be unravelled in a court of equity, unless there was corruption in the arbitrators. 1 *Chanc. Rep.* 279.

It should
be ac-
cording
to the
submis-
sion.

First *an award shall be according to the submission*: for, if an award be made of any other thing than what is contained in the submission, it is void; for no acts are my own, or binding to me, unless done by me, or by commission from me. *Plow.* 396. *Dyer* 241.

If arbitrators award to do an act to a stranger, this
is

is good ; for the stranger is put by the arbitrators in the place of the party, and they have power to award this act, since it is not impossible or unequal, and it is relating to the submission. 10 Co. 131. 1 Rol. Abr. 248.

But an award that an act should be done by a stranger is void, because he is not within the submission. Hard. 46.

Upon a submission to stand to an award touching all *matters in difference* between the parties, the award was, that they make general releases to each other of all demands. Upon error brought, it was insisted that the word *demands* is of a larger signification than the word *differences*. But Roll, Ch. J. answered, that if the release be more large in words, yet it is good enough ; for it shall be intended only of all matters in debate between the parties, and the court will not intend other matters, unless shewn in pleading, and to this the judges agreed, and judgment for the plaintiff, nisi, &c. Sty. 170.

Where the submission is of *all matters in difference*, the arbitrators, in disputes between two partners, may dissolve the partnership, as in the case of *Green and Waring*, T. 4 G. 3. It was moved to set aside an award between two partners, because the arbitrator, among other particulars, had directed the partnership to be dissolved ; which, it was argued, was exceeding his power. But, by the court : when all matters in difference were referred, he had clearly a power to dissolve it. If a difference between a master and apprentice were referred, the arbitrators would have a power to order the indentures to be delivered up. And though it was sworn that, at the trial of this cause, when the rule of reference was drawn up, generally in the usual form, referring *all matters in difference*, the plaintiff openly declared, that he would not have it understood that the arbitrator had a power to dissolve the partnership, lord Mansfield observed, that this is sufficient evidence, from the party's own mouth, that

Arbitrators may dissolve a partnership.

Of Arbitrations and Awards.

that the dissolution of the partnership was then a *matter of indifference*. And the rule for setting aside the award was discharged. *Blackstone's Rep.* 475.

If it be provided by the *submission* that the award should be notified, or delivered to the parties in writing, it is no award till notified or delivered, because it is not according to the power in the *submission*. *1 Vent.* 193.

Of deli-
vering
the award

If several persons of the one part, and several of the other part, *submit* themselves to arbitrament, provided the arbitrator deliver the award to the parties, or one of them, he is not obliged to deliver the award to one of each party; but it is sufficient to deliver it to any of the said parties. *Dyer* 218.

If the *submission* be, *so as the award be ready to be delivered to the parties, or to such of them as shall desire the same*, the parties so bound are themselves obliged to take notice of the award at their peril; but if the words of the *submission* be, *so that the award be delivered to each party by such a day*, then it must be delivered to each party accordingly. *Read. Arb. Wood b. 4. c. 3.*

Award
should be
equal,

Secondly, *an award should be equal, and not on one side only*: this must be understood thus; that all controversies being between two parties, that which is awarded to be done to one, must be an advantage to both, so as to end the controversy, and discharge one, as well as give satisfaction to the other; for if it does not, it is manifestly unjust; and therefore whenever it appears to the court, that, notwithstanding the award, the thing remains a duty as before, and is not discharged, that apparently is an award on *one side*, and consequently is void; not that where one party is by the award to have something paid him, or the like, and not the other, that the award should be naught; for perhaps nothing may be due to him, and he might be the only trespasser in the case. *1 Rol. Abr.* 253. *8 Co.* 98.

Thus

Thus in a case of trespass *submitted*, the arbitra- and of ad-
tors award that one shall pay the other 3*l*. this is void, vantage
because only on *one side*; for it is not said for what, to both
and therefore the trespass is not discharged, conse- parties.
quently the other party has no advantage in the
award. If the award had been that he shall pay
3*l*. for a trespass, it had been good, and yet one
only was to do an act; but then the trespass by
that award had been discharged. 1 *Rol. Abr.* 253,
254.

So if a man and woman submit themselves to an An award
award, it is no good award that they shall inter- to inter-
marry, for that ought to be at the parties choice; marry is
and the bodies of the parties are not submitted to void.
the power of the arbitrators. 1 *Rol. Abr.* 251. 1 *Bac.*
Abr. Arbitrament.

If an award be that an obligor in a single obliga-
tion shall pay the debt, this is no award, unless it
be provided that he be discharged; for payment in
that case is no discharge. *Hob.* 49. *pl.* 55.

But if the award be that one shall pay 10*l*. for
trespass, it is good; for a satisfaction implies a dis-
charge. *Baspool's case.* *Hob.* 49.

A submission to award was of *all matters in contro-* Common
versy, by rule of court, and award was made that so objec-
much money should be paid on one side, and nothing tions are
was awarded on the other side; and moved to set it a- not at-
side, as being an order only on one side. By *Holt*: *The* tended to
common exceptions against an award will not hold *here*, in a sub-
it being an award upon submission by rule of court; mission by
for, though there be no release awarded of one side, rule of
yet the submission was of all matters in controversy; court.
and we will not *grant an attachment* before they tender
a release; for, if one come to have aid of the court,
he shall do that which is fair and equitable before he
has it. 12 *Mod.* 234.

Thirdly, *the performance of the award must be pos-* Perform-
sible and lawful, Wood, *b.* 4. *c.* 3. If the arbitra- ance of
trators award a thing impossible, it is void; as if an award
they awarded a sum of money to be paid at a day must be
past, it is void. 8 *Ed.* 4. 1 *b.* possible,

An

An award that one of the parties shall do a thing out of his power, as to deliver up a deed which is in the custody of *J. S.* is void. *12 Mod. 385.*

Where a thing is awarded to be done, which afterwards becomes impossible by the act of God, the party is excused; as if an award be to deliver a horse before such a day, and he dies before that day. *21 Ed. 4. 7c.*

and legal. If an arbitrator awards a thing against law, this is void. *1 Rol. Abr. 249.*

Thus, if it be awarded that money shall be paid to an infant, and that he shall make a release, it is void; for the infant's release is not good in law. *Burn. 1, 133.*

Fourthly, *there must be a means by law to attain to the thing awarded.* If it be awarded that a person shall procure a stranger to do a thing, and he has no means by law to compel the stranger to do it, the award is void; but if he has any means to compel the stranger to do it, either by the Common Law, or in Chancery, he is bound hereby. *1 Rol. Abr. 248.*

So an award that he shall be bound, with sureties, is void as to the sureties. *1 Rol. Abr. 218.*

But the party himself may be awarded to pay any thing, though he has it not. *Id.*

Fifthly, *an award ought to be certain and final.* As an award is in the nature of a judgment, it ought to be wholly decisive, for if it does not determine the matter, it becomes a new controversy. *5 Co. 77.*

Award
should be
certain
and de-
cisive.

If the arbitrators award that one party shall give security to the other for the payment of a sum of money, such award is void for the uncertainty; not shewing what security he should give, whether by bond or otherwise. *Cro. Jac. 314.*

In the case of *Winter and Gallick*, *T. 3 Ann.* it was awarded that the defendant should pay to the plaintiff *10l.* and all the *costs* of suit then depending in an inferior court, and afterwards to give mutual releases.

releases. By the court : an award to pay such costs as the master shall tax, is good, because it may be reduced to a certainty ; but this is uncertain, and carries it farther than has hitherto been allowed. And *Holt* chief justice said, that it has been held a good award, to pay such costs as the prothonotary shall tax, and that carries it far enough ; but that surely the arbitrators should either ascertain it themselves, or refer it to a proper officer. 1 *Salk.* 75. 6 *Mod.* 195.

But in the case of *Dudley and Nettleford*, H. 13 G. where it was awarded that the plaintiff should pay the *costs* ; and nobody was appointed to tax them ; the court supplied it, by ordering the master to do it. *Str.* 737.

And an award to pay the charges of such a suit is good, because it is the intent of the arbitrators that it should be reduced to a certainty by the attorney's bill, who only can know the certainty. *Gro. Car.* 383. 2 *Vent.* 242. 3 *Lev.* 18.

On an award that a suit in chancery should be *dismissed*, it was objected that this was void, because not final ; for the party may *dismiss* his bill, and begin again : so that it was like an award that one of the parties should be *nonsuit*, which is ill ; but adjudged, that a nonsuit is not final in the nature of the thing, but a dismissal shall be intended a perpetual cessation. 1 *Salk.* 75.

In the case of *Hawkins v. Colclough*, E. 30 G. 2. Awards it was observed by Lord *Mansfield*, that awards are now considered with greater latitude and less strictness than they were formerly ; and with great reason, because they are made by judges of the parties own chusing. And this was in the case of an award made by a cobbler, upon a submission of all disputes ; which award was in these words : " Whereas there has been a suit at law between the parties, that has run to a great expence on both sides ; and it being left to me to make an end of it, I determine that they shall each of them pay their own charges at law ; and

F

that

that the defendant pay the plaintiff 5s. for his making the first breach in the law." And the award was held to be sufficiently certain and final. *Burrow*, Mansfield. 274.

And in the case of *Lucas and Wilson*, M. 32 Geo. 2. lord Mansfield said, the court will not enter into the merits of the matter referred to arbitration, but only take into consideration such legal objections as appear upon the face of the award, and such objections as go to the misbehaviour of the arbitrators. *Burrow*, Mansfield, 701.

Also in the case of *Tittenson and Peat*, in chancery, July 1, 1747, lord Hardwicke said, the only ground to impeach an award is collusion, or gross misbehaviour in the arbitrators; for otherwise it is final and binding upon all parties, or no persons would ever undertake to be arbitrators. 3 Atk. 529.

An arbitrator not obliged to declare the reasons on which he granted his award

In Chancery a bill was brought, July 30, 1748, to set aside an award, and the arbitrator was made a party: the bill sought a discovery from him of the grounds on which he made his award, and to set it forth minutely in his answer. But by lord Hardwicke, unless there is corruption or partiality in an arbitrator, the party cannot set aside his award; and if it should be allowed to make arbitrators defendants, and give them the trouble to set forth the particular reasons upon which they founded their award, it would introduce very great inconvenience, and be a discouragement to any person to undertake a reference. If a palpable mistake should happen to be made by an arbitrator, or a miscalculation in an account, the party aggrieved might bring his bill against the party in whose favour the award was made, to have it rectified, and not against the arbitrator. His lordship further observed, that he did not know whether there was any established rule of the court with regard to arbitrators setting forth the reasons of their award, and how far they were obliged to discover, and how far not; but if there was none, he should not scruple to make one, because

cause it would be unreasonable to put an arbitrator to so much trouble and expence, as such an answer must necessarily give him. 3 Atk. 644.

Where a cause has been referred by rule of *nisi prius*, and the costs directed to abide the event, that must be taken to mean the legal event. The plaintiff can recover no more costs than damages, for the arbitrator's award is not tantamount to a judge's certificate under the 22 and 23 C. 2. *Swingehurst v. Altham and another.* Durf. and East H. 29 G. 3.

Umpirage is where there is but one arbitrator of matters submitted to award, and is usually when the parties submit themselves to the arbitrament of certain persons; and if they cannot agree, or are not ready to deliver their award in writing before such a time, then to the judgment of another as umpire: and this is often the effect of bonds of submission to arbitration. 1 Rol. Abr. 261, 262.

When arbitrators have named an umpire, their authority ceases, though the time for making the award is not expired. Rep. of Pra. C. B. 116.

The court will not set aside the award of an umpire, because he received the evidence from the arbitrators without examining the witnesses, unless he were required to re-examine them, before the making of his award. As in the case of *Hall v. Lawrence*, 32 G. 3. The parties having referred all matters in difference to the award of two arbitrators, or, in case of their disagreeing, of an umpire, the arbitrators regularly heard all the evidence, but, disagreeing, stated this evidence to the umpire, on which he made his award without re-examining the witnesses. After he had made the award, the party against whom it was made applied to him to hear the evidence himself; and, on his refusal, moved the court of King's Bench to set aside the award; but the court thought, as no application was made to the umpire to examine the witnesses before he had made his award, the rule should be discharged with costs.

Umpirage;
what it is.

Whether
an umpire shall
re-examine the
witnesses.

Gibbs in support of the rule, *Bower contra. Durf. and East. iv. 589.*

By the 9 & 10 *W. c. 15.* it is enacted, that any arbitration or umpirage procured by corruption or undue means, shall be deemed void, and accordingly be set aside by any court of law or equity. *f. 2.*

Arbitrators may join with the umpire.

It seems clear, however, that arbitrators may join with the umpire in an award, as in the case of *Soulby and Hodgeson, E. 4th G. 3.* An action of debt was brought upon an arbitration bond. The arbitrators were to chuse an umpire if they themselves should not agree within a limited time. Not agreeing within the limited time, they chose an umpire. The umpire accordingly made an umpirage, and they joined in it. The only question was, whether the umpirage was duly made according to the power given the umpire; or whether it was vitiated and rendered void, by the arbitrators joining in it. The court were unanimous and clear, that this was the umpirage of the umpire only. He was at liberty to take what advice, opinion or assistants he pleased; and the joining of the arbitrators was only surplusage. *Burr. Mansf. 1474. Blac. Rep. 463.*

Arbitrator or umpire must not be interested,

It is a general rule in equity, that, where it appears that an arbitrator or umpire is in the least *interested* in the matters in controversy, the award shall be set aside. *Compl. Abr.*

nor receive large presents.

If an arbitrator receives any considerable sum of money, or any other present which may be construed a temptation to act corruptly, it is a strong presumption of partiality; but the sum or present must be proved to be so exorbitant as to induce the court to believe that it biased their judgment. *Compl. Arb. 76.*

Award vitiated by one party paying the arbitrators.

And, in some instances, where nothing has been given, and *one* of the parties paid the arbitrators for their trouble, and the other not contributing his share, has vitiated the award; as in the case of *Shepherd and Brand, T. 7 G. 2.* On a rule to shew cause why an award should not be set aside, one exception

ception was, that, *before making the award*, each of the arbitrators insisted upon three guineas, to be paid by the two parties for their trouble and expences; that the defendant refused to pay this moiety, whereupon the plaintiff paid the whole money. By the court: where arbitrators, though of the most unexceptionable characters, take money of one of the parties singly, whether for charges or any thing else, *before making their award*, as this is a matter of so tender a nature, that even the appearance of evil is to be avoided, and this practice may be of dangerous example, it is sufficient cause to set aside the award; for if this should be suffered, it would be hard to distinguish what is corruption. 2 *Barnardist.* 463. *Cas. in the time of lord Hardwicke*, 54.

An award is to receive a liberal construction, and to be governed by the intent of the arbitrators, where no inconvenience shall ensue. If the arbitrators award a thing to be done, in may be proper for them to appoint a time and place for doing it; and the party who would take advantage of it, must shew that he has done what was requisite on his part: but if a thing is to be done generally, without mentioning time and place, it should be done immediately, 2 *Brown.* 311.

When a submission is by rule of court, it is necessary to make a personal demand of the thing awarded; and the party must make affidavit of such demand, before he can have an attachment. 1 *Salk.* 83.

If there be an obligation to stand to an award, each ought to perform it on his part, at the peril of his obligation. 21 *Hen.* 7. 28 b.

Of Arbitrations and Awards.

Form of a Submission by Rule of Court.

WHEREAS divers disputes and controversies have arisen, and are now depending, between *A. B.* of in the county of yeoman, of the one part, and *C. D.* of in the said county, yeoman, of the other part; now for the ending and deciding thereof, it is hereby mutually agreed by and between the said parties, that all matters in difference between them shall be referred and submitted to the arbitrament, final end, and determination of *A. A.* of in the said county, gentleman, *B. A.* of in the said county, yeoman, and *C. A.* of in the said county, yeoman, or any two of them, arbitrators indifferently elected by the said parties, so as the said arbitrators, or any two of them, do make and publish their award in writing ready to be delivered to the said parties, or such of them as shall desire the same, on or before the day of next ensuing the date hereof; and it is hereby mutually agreed by and between the said parties, that this submission shall be made a rule of his majesty's court of king's bench at *Westminster*. In witness whereof the said parties to these presents have hereunto set their hands this day of in the year, &c.

Arbitration Bond.

K NOW all men by these presents, that I *A. B.* of in the county of gentleman, am held and firmly bound to *C. D.* of in the said county of yeoman, in pounds of good and lawful money of *Great Britain*, to be paid to the said *C. D.* or to his certain attorney, his executors, administrators, or assigns: to which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal, and dated the day of in the year of the reign of our sovereign lord
George

George the Third, of Great Britain, France and Ireland, king, defender of the faith, and so forth, and in the year of our Lord

The condition of the above obligation is such, that if the above-bound *A. B.* his heirs, executors, and administrators, and every of them, for and on his and their parts and behalfs, do and shall well and truly stand to, obey, abide, perform, observe, and keep the award, order, arbitrament, final end, and determination of *A. A.* of esquire, and *B. A.* of gentleman, arbitrators indifferently named, elected, and chosen, as well for and on the part and behalf of the above-bound *A. B.* as of the above-named *C. D.* to arbitrate, award, order, adjudge, and determine of and concerning all and all manner of action and actions, cause and causes of action and actions, suits, bills, bonds, specialties, judgments, executions, extents, accounts, debts, dues, sum and sums of money, quarrels, controvercies, trespasses, damages, and demands whatsoever, both in law and equity, or otherwise howsoever, which at any time or times heretofore have been had, made, moved, brought, commenced, sued, prosecuted, committed, omitted, done, or suffered by or between the said parties, so as the said award be made in writing, and ready to be delivered to the said parties, on or before the day of now next ensuing; then this obligation to be void, otherwise of force.

Condition to stand to the Award of two Arbitrators, in common Form.

THE condition of the above obligation is such, that if the above-bound *A. B.* his heirs, executors, and administrators, and every of them, for and on his and their parts and behalfs, do and shall well and truly stand to, obey, abide, perform, observe and keep the award, order, arbitrament, final end and determination of *A. A.* of esquire, and *B. A.* of gentleman, arbitrators indifferently named

named elected, and chosen, as well for and on the part and behalf of the above-bound *A. B.* as of the above-named *C. D.* to arbitrate, award, order, adjudge and determine of and concerning all and all manner of action and actions, cause and causes of action and actions, suits, bills, bonds, specialties, judgments, executions, extents, accounts, debts, dues, sum and sums of money, quarrels, controversies, trespasses, damages and demands whatsoever, both in law and equity, or otherwise howsoever, which at any time or times heretofore have been had, made, moved, brought, commenced, sued, prosecuted, committed, omitted, done or suffered by or between the said parties, so as the said award be made in writing, and ready to be delivered to the said parties, on or before the day of now next ensuing; and if the said *A. B.* his heirs, executors, or administrators, or any of them, shall not prefer, or cause to be preferred, any bill in equity against the said *A. A.* and *B. A.* or either of them, for or concerning their award in the premises; Then this obligation to be void, otherwise of force.

If the parties choose to make their submission a rule of court, then this may be added.

And the above-bound *A. B.* doth agree and desire, that this his submission be made a rule of his majesty's court of king's bench at *Westminster*, pursuant to the act of parliament in such case made and provided.

Condition to stand to the Award of three Arbitrators, or any Two of them, and an Umpire appointed.

THE condition of this obligation is such, that if the above-bound *A. B.* his heirs, executors, and administrators, for and on his and their parts and behalfs, shall and do well and truly stand to, obey,

obey, abide, observe, perform, fulfil, and keep the award, order, arbitrament, final end, and determination of or any two of them, arbitrators indifferently elected and named, as well by and on the part and behalf of the said *A. B.* as by and on the part and behalf of the above-named *C. D.* to arbitrate, award, order, judge, and determine, of and concerning all and all manner of action and actions, cause and causes of action and actions, suits, bills, bonds, specialties, covenants, contracts, promises, accounts, reckonings, sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever, at any time heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by or between the said parties; so as the award of the said arbitrators, or any two of them, be made and set down in writing, under their or any two of their hands and seals, ready to be delivered to the said parties in difference, on or before the day of now next ensuing; then this obligation to be void, otherwise of force. And if the said arbitrators shall not make such their award of and concerning the premises, within the time limited as aforesaid, then if the said *A. B.* his heirs, executors, and administrators, for and on his and their part and behalf, do and shall well and truly stand to, observe, perform, fulfil, and keep the award, determination, and umpirage, (*if the umpire be named,*) of being a person indifferently named and chosen between the said parties for umpire; (*if not named,*) of such person as the arbitrators shall indifferently chuse for umpire in and concerning the premises; so as the said umpire do make and set down his award and umpirage in writing, under his hand and seal, ready to be delivered to the said parties in difference, on or before the day of now next ensuing; and if the said *A. B.* his heirs, executors, or administrators, or any of them, shall not prefer, or cause to be preferred, any bill inequity, against
G them

Of Arbitrations and Awards.

them the said arbitrators and umpire, or any of them, for or concerning the award of them the said arbitrators or umpire in the premises: then this obligation to be void, otherwise of force.

[And the above-bound *A. B.* doth agree and desire, that this his submission be made a rule of his majesty's court of king's bench at *Westminster*, pursuant to the act of parliament in such case made.]

Form of an Award.

TO all whom these presents shall come, we *A.*
B. of and *C. D.* do send greeting.

Whereas there are several accounts depending, and divers controversies have arisen, between of
 yeoman, of the one part, and of
 yeoman, of the other part: And whereas, for the putting an end to the said differences, they the said
 and by their several bonds or obligations, bearing date last past, are reciprocally become bound each to the other, in the penal sum of to stand to, abide, perform, and keep the award, order, and final determination of us the said
 so as the said award be made in writing, and ready to be delivered to the parties in difference on or before next ensuing, as by the said obligations and conditions thereof may appear: Now know ye, that we the said arbitrators, whose names are hereunto subscribed, and seals affixed, taking upon us the burden of the said award, and having fully examined and duly considered the proofs and allegations of both the said parties, do make and publish this our award between the said parties in manner following; that is to say, First, we do award and order, that all actions, suits, quarrels, and controversies whatsoever, had, moved, arisen, and depending between the said parties in law or equity, for any manner of cause whatsoever touching the said premises, to the day of the date hereof, shall
 cease

cease and be no further prosecuted; and that each of the said parties shall pay and bear his own costs and charges in any wise relating to, or concerning the premises. And we do also award and order, that the said shall deliver or cause to be delivered to the said at within the space of &c. And further, we do hereby award and order, that the said shall on or before pay or cause to be paid unto the said the sum of We do also award and order, &c. And lastly, we do award and order, that the said and on payment of the said shall in due form of law, execute each to the other of them, or to the other's use, general releases, sufficient in the law for the releasing by each to the other of them, his heirs, executors, and administrators, of all actions, suits, arrests, quarrels, controversies, and demands whatsoever, touching or concerning the premises aforesaid, or any matter or thing thereunto relating, from the beginning of the world until the day of last past (viz. *the day of the date of the arbitration of bonds*). In witness whereof we have hereunto set our hands and seals the day of

Witnesses hereof,

A. B.

C. D.

Form of an Umpirage.

AFTER *reciting the arbitration bonds, as before, add,*
Now know ye, that I umpire indifferently chosen by having deliberately heard and understood the griefs, allegations, and proofs, of both the said parties, and willing (as much as in me lieth) to set the said parties at unity and good accord, do by these presents arbitrate, award, order, decree, and judge as followeth; That is to say, &c.

Auctioneer.

Auctioneers
to take
out a
licence.

EVERY auctioneer residing within the bills of mortality, must take out an annual licence at the excise-office, for which he is to pay 20s. with three *5l. per cents* thereon, *1l. 3s. 0d.* and without the bills 5s. with the three *5l. per cents*, *5s. 9d.*; for which he must apply to the collectors and supervisors within the district where he lives, under the penalty of 100*l.* in London, and 50*l.* in the country. Sworn Brokers, admitted by the lord mayor and court of aldermen of London, are to pay only 5s. for their licence. 17 G. 3. c. 50.

What
shall be
paid in
the
pound on
estates,
&c.

By the 27 G. 3. c. 13. three-pence half-penny in the pound is to be paid upon all goods sold by auction under the following description, viz. Any interest in reversion, or possession in any freehold, copyhold, or leasehold lands, tenements, houses, or hereditaments, and of any annuities, or sums of money charged thereon, and of any utensils in husbandry and farming stock, ships and vessels, and of any reversionary interests in the public funds; also plate and jewels.

What on
Goods,
&c.

Seven-pence in the pound to be paid upon all goods of the following description, viz. Fixtures, furniture, pictures, books, horses, carriages, and all other goods and chattels whatsoever, except such as are hereafter exempted.

To be
paid by
the auc-
tioneer.

The above duties are a charge on the auctioneer (not the purchaser) for which he is to give bond for 200*l.* with two sureties, to pay within twenty-eight days after each sale, the amount of the said duties, which he must state upon oath. In the country six weeks are allowed to pay in the duty. 17 G. 3. c. 50.

Notice to
be given.

Two days previous notice of every sale, with an attested catalogue, is to be sent to the excise-office, mentioning where and when the sale is to be made, or forfeit 20*l.* Three days previous notice in the country.

By

By the 32 G. 3. c. 11, auctioners giving such notice shall, if within the limits of the excise-office, with-
 in twenty-eight days after the day specified in the notice for the sale to be made; and out of the limits within six weeks after, deliver to the excise-office in London, or officer in the country, a declaration in writing, on oath, setting forth whether the auction was opened or begun, or any lot bid for or sold at such auction, on pain to forfeit 50*l.* half to the king, and half to the informer.

Auc-
 tioners
 to give a
 declara-
 tion in
 writing.

But these duties are not to extend to goods or estates sold by order, or under decrees of the court of chancery, or exchequer, or commissioners of customs, excise, board of ordnance, great sessions or exchequer in Wales, or Scotland, East-India company, navy, or victualling-office, goods distrained for rent or tythes, or sales on account of lords or ladies of any manor, for granting copyhold, or customary messuages, lands, &c. for lives or years, or under sheriff's authority for the benefit of creditors, nor the effects of bankrupts sold by assignees, or goods imported by way of merchandise from any British colony or plantation in America, provided it is the manufacture or growth of that colony, and really sold for the benefit of the original importer, to whom they were consigned, if the sale is within twelve months after their arrival here, nor goods wrecked or stranded, if sold for the benefit of the insurers or proprietors, or goods damaged by fire, if sold for the benefit of the insurer or insurers. Corn, hay, grass, dung, live or dead stock, or any kind of produce which is sold on the estate where it grows, are also exempt, if sold by the owner of such estate. The unmanufactured produce of mines is likewise exempt, if sold by the proprietor of the mine.

Exemp-
 tions.

And by the 29 G. 3. c. 63, all goods woven or fabricated in the loom in this kingdom, which shall be sold in the quantity in which the same shall be taken from the loom, and in lots of the price of 20*l.*

Further
 exemp-
 tions, by
 29 G. 3.

or

or upwards, shall not pay the auction duty imposed by the act of 27 of G. 3. but not in any other than entered places, nor unless the goods were exposed at the sale.

Security
required.

The auctioneer to give security, besides the bond directed in the 27 G. 3. in the sum of 5000*l.* with two sureties at least, that he will, within fourteen days, after such sale, deliver to the next office of excise a particular account of the several lots so sold, the amount of the money bid, and the price of each; and that he will not knowingly put up for sale any piece or other goods of foreign manufacture, except in the quantity in which the same were taken from the loom, without charging the duties, imposed by 27 G. 3.

Additional
exemptions.

By the 30 G. 3. c. 26, any goods imported into this kingdom, by way of merchandise, from the settlement of Yucatan, in south America, shall be free from the duty on the first sale of such goods at auction by the original importer to whom the same was consigned, and by whom they were entered at the custom-house at the port of importation; so as such sale shall be made within twelve months after such goods shall be imported.

Auctioneers
not to
exaggerate.

If auctioneers make use of exaggeration in the description of their lots, the purchaser, who has been induced to purchase from such exaggerated representations, shall be at liberty to be off his bargain. This was determined in the court of king's bench, before lord Kenyon, in the case of *Ellice v. Christie*. T. 32 G. 3.

A bidder
at an auc-
tion, un-
der the
usual
condi-
tions that
the high-
est bidder
shall be
the pur-
chaser,

E. 29 G. 3. Payne v. Cave. This was an action tried at the sittings after last term at *Guildhall*, before lord Kenyon, wherein the declaration stated that the plaintiff, on the 22d September 1788, was possessed of a certain worm-tub, and a pewter worm in the same, which were then and there about to be sold by public auction by one S. M. the agent of the plaintiff in that behalf; the conditions of which sale were to be the usual conditions of sale of goods sold by auction, &c.

&c. of all which premises the defendant afterwards, to wit, &c. had notice; and thereupon the defendant, in consideration that the plaintiff, at the special instance and request of the defendant, did then and there undertake and promise to perform the conditions of the said sale, to be performed by the plaintiff, as seller, &c. undertook, and then and there promised the plaintiff to perform the conditions of the sale, to be performed on the part of the buyer, &c. And the plaintiff avers, that the conditions of sale herein after mentioned, are usual conditions of sale of goods sold by auction, to wit, that the highest bidder be the purchaser, and should deposit five shillings in the pound; and that if the lot purchased were not paid for and taken away in two days time, it should be put up again and resold, &c. (stating all the conditions.) It then stated that the defendant became the purchaser of the lot in question for 40*l.* and was requested to pay the usual deposit, which he refused, &c. At the trial, the plaintiff's counsel opened the cause thus:—The goods were put up in one lot at an auction; there were several bidders, of whom the defendant was the last, who bid 40*l.* The auctioneer dwelt on the bidding, on which the defendant said, "Why do you dwell: you will not get more;" the auctioneer said that he was informed the worm weighed at least 1300 weight, and was worth more than 40*l.* The defendant then asked him whether he would warrant it to weigh so much, and received an answer in the negative; he then declared that he would not take it, and refused to pay for it. It was re-sold on a subsequent day's sale for 30*l.* to the defendant, against whom the action was brought for the difference. Lord *Kenyon*, being of opinion on this statement of the case, that the defendant was at liberty to withdraw his bidding any time before the hammer was knocked down, non-suited the plaintiff.

Walton now moved to set aside the non-suit, on the ground that the bidder was bound by the conditions

ditions of the sale to abide by his bidding, and could not retract. By the act of bidding he acceded to those conditions, one of which was, that the highest bidder should be the buyer. The hammer is suspended, not for the benefit of the bidder, or to give him an opportunity of repenting, but for the benefit of the seller: in the mean time the person who bid last is a conditional purchaser, if nobody bids more. Otherwise it is in the power of any person to injure the vender, because all the former biddings are discharged by the last; and, as it happened in this very instance, the goods may thereby ultimately be sold for less than the person who was last outbid would have given for them. The court thought the non-suit very proper. The auctioneer is the agent of the vender, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller, by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus pœnitentia*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed. Rule refused. *Durnf. and East.* 148.

Bankers.

Only six
persons
in part-
nership.

BY the 6 *Ann.* c. 22, s. 9. During the continuance of the Bank of England, no number of persons whatsoever, exceeding the number of six, may be united in partnership in *England*, to borrow, owe, or take up, any sum of money on their bills or notes payable at demand, or at any time less than six months.

A Bank-

A banker's draft is only taken conditionally *if paid*, Banker's draft. and not otherwise, unless there is an express agreement to take it as cash. 2 *Stalk.* 442. 2 *Ld. Raym.* 928.

But a person in *London* who receives a draft on a banker there, is obliged at his peril to present it for payment on the day he receives it, unless there is not a reasonable time for that purpose. 2 *Stra.* 1175. 1248. 1 *Ld. Raym.* 743. When to be presented.

But it has been held by a very high and respectable authority, that it is not necessary to present a banker's draft for payment on the day in which it is received, and that twenty-four hours is a reasonable time for that purpose; but with great deference to that authority, I conceive that the consequences of such an allowance generally, may possibly be highly prejudicial to the commerce of the capital. The usual way in which bankers' drafts are disposed of, is by sending them to the banker of the holder, (and almost every man in trade now employs a banker in his money transactions); and admitting that twenty-four hours is a reasonable time, then a banker might, without prejudice to himself, neglect to present all the drafts of his customers 'till the following day.' This it must be allowed is an extreme case, but yet within the limits of such a rule. On the other hand it is unreasonable that a man should sustain any injury, who receives a draft at *Hyde-Park Corner* late in the day, because he does not run down into the city to present it on the same day. The jury are in such cases the most proper judges of what is a reasonable time, (which cannot be fixed by any stated rule, but must vary with circumstances) in as much as it is generally composed of men accustomed to commercial transactions, and liable to be in a situation similar to that of the parties. I have therefore inserted the former determinations, which I hold to be law. *Points in Law and Eq.* 30.

A banker's draft payable to bearer and indorsed, is a bill of exchange against an indorser, and he is equally liable. 1 *Ld. Raym.* 743. Draft indorsed.

Bankrupt.

If a bank bill, or banker's draft payable to *A.* or bearer, be delivered to him and lost, and is afterwards found by a stranger; *A.* may have an action against the finder, for he had no title to it; though if the banker pays it he is indemnified. But if the stranger transfers it to *B.* for a valuable consideration, *A.* cannot maintain an action against *B.* by reason of the course of trade, which creates a property in the assignee. 1 *Salk.* 126.

If a banker's clerk overpays a bill, he may be admitted evidence for his master, though unless the money be recovered he is answerable; but this is only for the necessity of the thing, for the consequence of rejecting such a witness would be mischievous. 11 *Mod. Rep.* 261. 1 *Stra.* 647. See *Bills of Exchange.*

Bankrupt.

Traders
only can
have the
benefit of
the bank-
rupt laws

THE benefit of the bankrupt laws is allowed to none but actual traders; as they are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts, without any fault of their own. If persons in other situations of life contract debts, without the power of payment, they must take the consequences of their own indiscretion; for the law deems it an unjustifiable practice for any person, who is not in trade, to incumber himself with debts to any considerable amount. If a gentleman, or one in a liberal profession, when he becomes in debt, has a sufficient fund to discharge such debt, the delay of payment is a species of dishonesty, and a temporary injustice to the creditor; and if he has not a sufficient fund, the dishonesty and injustice is the greater. Trade cannot be carried on without mutual credit; the contracting of debts is therefore not only justifiable, but necessary.

fary. And if accidental calamities, as the loss of a ship in a storm, the failure of those with whom we have commercial connexions, or the non-payment of persons out of trade, render it impossible for a merchant or trader to discharge his own debts, it is his misfortune, and not his fault. To the misfortunes therefore of debtors, the law has given a compassionate remedy, but denied it to their faults.

- I. What are Acts of Bankruptcy.*
- II. Who are liable to be Bankrupts.*
- III. Who are not liable to be Bankrupts.*
- IV. Issuing the Commission and choosing Assignees.*
- V. Examination of the Bankrupt, his Wife, and others.*
- VI. Disposal of the Bankrupt's Estate.*
- VII. The Bankrupt's Certificate and Discharge.*

I. What are Acts of Bankruptcy.

The various acts of bankruptcy within the several statutes brought together into one view, seem to be as follows : Every person shall be a bankrupt, who, using the trade of merchandize, by way of bargaining, exchange, bartry, chevifance, or otherwise, in gross, or by retail, or seeking his trade of living by buying and selling, or that shall use the trade or profession of a scrivener receiving other men's monies or estates into his trust or custody, shall,

- 1. Depart the realm ;
- 2. Begin to keep his house ;
- 3. Absent himself ;
- 4. Take sanctuary ;
- 5. Willingly or fraudulently suffer himself to be arrested for any debt or other thing not grown or due for money delivered, wares sold, or any other just or lawful cause or good consideration or purposes ;
- 6. Shall suffer himself to be outlawed ;
- 7. Yield himself to prison ;

H 2

8. Wil-

Bankrupt.

8. Willingly or fraudulently shall procure his goods to be attached or sequestered;

9. Departing from his dwelling-house;

10. Making any fraudulent grant or conveyance of his lands or goods, whereby his creditors may be defeated or delayed for the recovery of their just debts.

11. Shall obtain any protection, other than such person as shall be lawfully protected by privilege of parliament.

12. Shall prefer to any court any petition or bill against any of his creditors, thereby endeavouring to enforce them to accept less than their just debts, or to procure time, or longer days of payment than were given at the time of their original contract; or,

13. Being arrested for debt, shall lie in prison two months upon that or any other arrest or detention for debt.

14. Being arrested for 100l. or more, shall escape out of prison.

15. Paying the petitioning creditor, or delivering to him goods or security for his debts, whereby he shall *privately* have more in the pound than the other creditors; or,

16. Neglecting to make satisfaction for any just debt to the amount of one hundred pounds, within two months after service of legal process, for such debt, upon any trader having privilege of parliament.

1. *Departing the Realm.* 1 Jac. c. 15. s. 2.

By departing from the realm, a man withdraws himself from the jurisdiction and coercion of the law, in order to defraud his creditors. 2 *Blackst. Com.* 478.

If a merchant departs the realm with the consent of his creditors, he does not thereby commit an act of bankruptcy.

2. *Begin to keep his house.* 13 Eliz. c. 7. s. 1.

Keeping in his own house, privately, so as not to be seen or spoken with by his creditors, except for just and

and necessary cause, is construed to be an intention to defraud his creditors, by avoiding the process of the law. *Blackst. Com.* 478.

If a tradesman conceals himself, or absconds within his house, with intent to delay or defraud his creditors, it makes him bankrupt, though the concealment be only for a short time. 2 *Show. Rep.* 523.

But lord chancellor *Hardwicke* declared, that a person's denying himself to a creditor at eleven o'clock at night was no act of bankruptcy: for it could not be said to be done with an intent to defraud his creditors, which is an ingredient the acts of parliament require to make a man bankrupt. *Atk. Rep.* 201. pl. 104.

Denying
at an un-
reason-
able hour

Keeping house to avoid an attachment for not delivery of goods, no debt being due, is not an act of bankruptcy. *Atk. Rep.* 196. pl. 102.

But otherwise for fear of an attachment in chancery. *Atk. Rep.* 240. pl. 131.

If a man denies himself, knowing that a creditor comes for a debt, he has committed an act of bankruptcy. *Com. Dig.* 523.

But lord chancellor *Talbot* said, that a debtor's denying himself to a creditor by note of hand, payable at a future day, was not an act of bankruptcy. 7 *Vin. Abr.* 61. pl. 14.

Denying
to a cre-
ditor on a
note not
due.

The denial must be with intent to delay creditors, therefore being denied when sick in bed, or engaged in company, would be no act of bankruptcy: but if a trader orders himself to be denied, circumstances may shew that he did not do it to avoid payment, but on account of sickness or particular business. *Burr. Rep.* 484.

Denying
when ill.

If a man commits a plain act of bankruptcy, as keeping house, &c. though he afterwards goes abroad, and is a great dealer, yet that will not purge the first act of bankruptcy. *Cro. Eliz.* 13. pl. 6.

Going
abroad
after-
wards.

No act of bankruptcy can be purged but by obtaining a certificate. 2 *Blackst. Com.* 485, 486. *Burr. Rep.* 474.

But

Bankrupt.

But in the case of *Hopkins v. Ellis*, at *nisi prius* at *Guildhall*, T. 3 Ann. on an issue directed out of Chancery, whether the person was a bankrupt or not at such a time, it was held *per Holt*, chief justice, that if *H.* commits a plain act of bankruptcy, as keeping house, &c. though he afterwards goes abroad, and is a great dealer, yet that will not purge the first act of bankruptcy, but he will still remain a bankrupt; but if the act was doubtful, then going abroad and dealing, &c. will be an evidence to explain the first act. Also, if after a plain act of bankruptcy he pays off or compounds with all his creditors, he is become a new man. 1 *Salk.* 110.

3 *Absent himself.* 1 Jac. c. 15. f. 2.

For fear
of arrest.

If a man absents himself for fear of being arrested by an attachment out of the court of Chancery, for non-payment of money decreed, it is an act of bankruptcy. *Com. Dig.* 523.

For felony.

For a man to absent himself for felony, is an act of bankruptcy, if his creditors are thereby delayed of their just debts; otherwise not.

If a man, having no constant dwelling, absents himself from his usual abode, he shall be adjudged bankrupt. *Com. Dig.* 523.

If a merchant indebted departs the realm to merchandize, and having loss by tempest, returns no more; this is not a *departing*, but an *absenting* himself. *Stone* 123, 124. See “2 Begin to keep his House.”

4. *Take Sanctuary.* 1 Jac. c. 15. f. 2.

Taking
refuge in
the verge
of the
court, &c

Taking sanctuary is taking refuge in any place, where the law cannot be so readily executed upon him, to delay the payment of his debts to his creditors: viz. within the verge of the court, or in any other particular place of refuge: but where a person has resided within the verge of the court many

many years together, such residence cannot be deemed an act of bankruptcy; notwithstanding the person so resident has been declared a bankrupt, and the commission has even appeared in the Gazette.

5. *Wilfully or fraudulently suffer himself to be arrested.*
1 Jac. c. 15. f. 2.

If a man shall suffer himself to be arrested, without a just and lawful cause; such a proceeding shall be deemed an attempt to defraud his creditors. ^{Suffering himself to be arrested,} 2 *Blackst. Com.* 478.

Or, if he causes a voluntary or feigned action to be commenced against him; as at the suit of a friendly plaintiff, in order to be turned over from one prison to another; for this being mere form, the bail never justify. *Burr.* 349.

So, where the party procures himself to be arrested upon a sham debt, that, by the statute of ^{or a sham debt.} *Elizabeth*, is immediately an act of bankruptcy.
13 *Eliz. c. 7. f. 1.* 7 *Vin. Abr.* 62.

6. *Shall suffer himself to be outlawed.* 1 Jac. c. 15. f. 2.

But an outlawry in Ireland does not make a man bankrupt. *Com. Dig.* 524.

Nor an outlawry in *England*, unless with intent to defraud creditors, as it *seemeth*; or if it be reversed before the commission issues, or for default of proclamations after the commission. 2 *Sid.* 69, 114, 176, *Com. Dig.* 524.

7. *Yield himself to Prison.* 13 *Eliz. cap. 7. f. 1.*
1. Jac. c. 15. f. 2.

This is to be understood a voluntary yielding, and not when a man is imprisoned for non-payment of a fine, or any refractory behaviour; for, though the act which caused the imprisonment be voluntary, the imprisonment itself is involuntary. ^{It must be voluntary yielding.} *Billingh.*
95. *Good.* 25.

A per-

Bankrupt.

A person was arrested for twenty-eight pounds, and, though he had money sufficient to pay the debt, he chose rather to go to prison, in order, as he declared, to force his creditors to come to a composition; and, by lord chancellor *Talbot*, this is an act of bankruptcy, within 1 *Jac.* though, without such intent, yielding himself to prison was no act of bankruptcy, unless he continued there two months. 7 *Vin. Abr.* 61, 62.

8. *Willingly or fraudulently procure his Goods to be attached, &c.* 1 *Jac.* c. 15. s. 2.

Willingly suffering goods, &c. to be attached or sequestered by any legal process, is another direct endeavour to disappoint his creditors of their security. 2 *Blackst. Com.* 478.

But, if his goods are attached, or sequestered, without his procurement, that shall not make him bankrupt. *Com. Dig.* 523.

9. *Departing from his Dwelling-house.* 13 *Eliz.* c. 7. s. 1. 1 *Jac.* c. 15. s. 2.

Abscond- Being denied to a creditor is only evidence of an
ing may act of bankruptcy; absconding is the material part
be known of it. Lord *Mansfield* said, If a trader leaves his
from cir- house, circumstances may show it was not to abscond.
cumstan-
ces. *Burr. Rep.* 484.

Depart- One *Hall* rode out of town, and returned in the
ing to de-evening, before which a bailiff had been at his shop
lay pro-to arrest him: the next morning he sent for the
cess one bailiff, and informed him that he went out in order
term. to get the term of the plaintiff; and, now the re-
turn of the writ was out, if a new writ was taken out
he would give bail, which was done accordingly.
And this was held to be an act of bankruptcy, with-
in 1 *Jac.* c. 15. s. 2. 2 *Str.* 809.

10. *Making*

10 *Make any fraudulent Grant or Conveyance.* 1 Jac.
c. 15. s. 2.

Making a fraudulent grant, &c. to a friend, or Fraudulent trustee, of his tenements or goods, is endeavouring to disappoint his creditors of their security. 2 *Blackst. Com.* 478.

If a person makes a grant, or conveyance fraudulent within the statute of 13 *Eliz. c. 5.* or 27 *Eliz. c. 4.* it makes him bankrupt; and if he makes a fraudulent grant, &c. he will be bankrupt, though he afterwards appears publicly upon the Exchange, &c. *Com. Dig.* 525.

If a trader makes a conveyance of his whole substance to a particular creditor, himself continuing in possession, and acting as visible owner; even if such conveyance be made by way of security, and for valuable consideration, it is fraudulent and a specific act of bankruptcy within the above clause. *Burr. Rep.* 484, 829.

Cannot convey his whole substance.

This was also adjudged in the case of *Wilson v. Day, Tr.* 32, and 33, G. 2, before lord Mansfield, chief justice, who said, if a bankrupt assigns all his effects, the very deed is an act of bankruptcy itself, as it defeats the whole bankrupt law, and leaves nothing for the creditors. 2 *Burr.* 827.

If a trader execute a bill of sale of all his stock and effects to pay certain creditors, the overplus, if any, to be accounted for to himself, this is an act of bankruptcy. 1 *Doug.* 295.

Bill of Sale.

Such preference would defeat the management of the bankrupt's estate, and an equal distribution among his creditors. The law gives the management to persons chosen by the creditors, under the direction of commissioners, and the control of the great seal. An equal distribution among creditors, who equally gave a general personal credit to the bankrupt, has been anxiously provided for ever since the act of 21 *Jac. c. 19.* *Burr. Rep.* 476. *Atk. Rep.* 183, 229, 233.

It would defeat the intention of the bankrupt acts.

A conveyance of part not an act of bankruptcy.

A conveyance of *part* of a trader's estate may be public, fair, and honest; as a trader may sell, so he may openly transfer many kinds of property by way of security; but a conveyance of *all* must either be fraudulently kept secret, or produce an immediate absolute bankruptcy.

Assignment of part.

But an assignment by deed of a lease, *part* of a bankrupt's estate, *in contemplation of an act of bankruptcy*, is itself an act of bankruptcy.

So it is, though such an assignment is only *one third* of his stock. 3 *Wils.* 47.

A parol assignment of only part of a trader's stock, and though by way of security, if done in contemplation of a bankruptcy, is void. *Corwp.* 629.

A stoppage or refusal of payment is no act of bankruptcy; nor is an arrest, if bail be given. 7 *Mod. Rep.* 139.

In some cases a preference may be given to friends.

Holt, chief justice, in a case between *Hopkins* and *Gery*, declared, that, if a banker or goldsmith, who has many people's money, refuses payment, yet keeps his shop open, and as often as he is arrested, gives bail, and by that means gives preference of payment to his friends, and when he has done, runs away, yet such payment shall stand against a commission of bankruptcy. This was practised in the case of *Shephard* the banker, who was arrested almost every hour in the day for several days together, before he went off, and yet gave bail as often, and paid his friends, and then went and rendered himself in discharge of his bail. 7 *Mod. Rep.* 139.

11. *Shall obtain any Protection, other than such Person as shall be lawfully protected by Privilege of Parliament.* 21 Jac. c. 19. s. 2.

Procur-
ing pro-
tection.

A trader procuring any protection, not being himself privileged by parliament, in order to screen his person from arrests, has shewed an endeavour to elude the justice of the law. 2 *Blackst. Com.* 478.

By

By the 7 *Ann. c. 12 f. 5.* no merchant or trader, within the description of the statutes against bankrupts, who shall put himself into the service of an ambassador, or public minister, shall have any privilege.

It seems, therefore, that a person's procuring himself the protection of an ambassador, or public minister, is an act of bankruptcy within the 21 *Jac.* as it defeats or delays creditors, or tends so to do.

12. *Shall prefer to any Court any Petition or Bill against any of his Creditors, thereby endeavouring to enforce them to accept less than their just Debts, or to procure Time, or longer Days of Payment than were given at the Time of their original Contract.* 21 *Jac. c. 19. f. 2.*

A petition of this kind is an acknowledgment of poverty or knavery. *Blackst. Com. 478.*

But if the creditors, upon request, enlarge the time for payment, it does not make the party bankrupt. *Com. Dig. 524.*

13. *Being arrested for Debt, shall lie in Prison two Months, upon that or any other Arrest or Detention for Debt.* 1 *Jac. c. 15. f. 2.* 21 *Jac. c. 19. f. 2.*

The inability of a trader to find bail, in order to obtain his liberty, argues a strong deficiency in his credit, owing either to suspected poverty, or ill character; and his neglecting to do it, if able, can arise only from a fraudulent intention: in either of which cases it is time his creditors should compel a distribution of his effects. 2 *Burr. Rep. 819.* 2 *Blackst. Com. 478, 479.*

Not being able to find bail, a presumption of poverty, &c.

If a trader owes twenty (or ten) pounds, and be arrested for it, and lie in prison two months, this makes him bankrupt. *Good. 25.*

When
bail is put
in.

Where bail is put in, the bankruptcy only relates to the time of surrender; as the most substantial trader is liable to be arrested, and the mere being arrested is no presumption of insolvency: the presumption from his lying in prison, two months, without his being able to get bail, is a very strong one. 2 Burr. Rep. 818.

Two
months
from sur-
render-
ing.

A. being arrested puts in bail, surrenders in discharge of his bail, and lies above two months in prison; he is bankrupt only from the time of his surrender, not from the time of his arrest. Resolved unanimously. *Tribe. v. Webber*, H. 17 G. 2. 2 Burr. Rep. 815.

Statute
months
are lunar.

Lord Hardwicke said that the word *months*, in an act of parliament, means *lunar*. 3 Atk. Rep. 346. See also page 10 of this work.

14. Being arrested for 100l. or more, shall escape out of Prison. 21 Jac. c. 19. s. 2.

It is not to be supposed that any man would break prison, who was able and desirous to procure bail. 2 Blackst. Com. 479.

The act which renders the trader a criminal, must mean an escape against the consent of the sheriff, a running away and breaking his prison. Burr. Rep. 440.

15. Paying the petitioning Creditor, or delivering to him Goods or security for his Debt, whereby he shall privately have more in the Pound than the other Creditors. 5 G. 2. c. 30. s. 24.

This act of bankruptcy is best explained in the preamble of the above clause of the statute, in the following words: "Whereas commissions of bankrupt are frequently taken out by persons, who by means of such commissions, (on a composition proposed by the bankrupt), and on promise not to execute the same, prevail with and extort from the

the bankrupt their whole debts, or much greater part thereof than such bankrupts pay to their (*other*) creditors, or otherwise get from such bankrupts, goods, or other real or personal security: which is contrary to the true intent and meaning of the several statutes made concerning bankrupts; which said statutes intend, that all such bankrupt's creditors shall be on an equal foot, and not ene preferred before another, or paid more than another, in respect to his or her debt." 5 G. 2. c. 30. s. 24.

16. *Neglecting to make Satisfaction for any just Debt, to the Amount of 100 Pounds, within two Months after Service of legal Process, for such Debt, upon any Trader having Privilege of Parliament.* 4 G. 3. c. 33. s. 1.

The reasons assigned in the statute for declaring this to be an act of bankruptcy, are these: "To support the honour and dignity of parliament, and good faith and credit in commercial dealings, which require that, in cases of bankruptcy, the laws should have their due course, and that no merchants, bankers, brokers, factors, scriveners, or traders, within the description of the statutes relating to bankrupts, having privilege of parliament, in any case of actual insolvency, should, by any *privilege whatever*, be exempted from doing equal justice to all their creditors."

But, to make this a perfect and complete act of bankruptcy, a creditor must make and file on record, in one of the courts at *Westminster*, an affidavit that the debt is justly due to him; and that his debtor, as he verily believes, is a merchant, &c. within the description of the statutes relating to bankrupts. 4 G. 3. c. 33. s. 1.

II. *Who are liable to be Bankrupts.*

Every trader is liable to a commission, who can maintain an action for calling him *bankrupt*: this Persons who can maintain an action appears

for being
called
bank-
rupts,
may be
bank-
rupts.

appears from the necessary allegations in the declaration, and from the proof that the court requires on the trial of such action; for the court expects the plaintiff not only to alledge in his declaration that he is a tradesman, but also that he gains his living by buying and selling; and that he is liable to become bankrupt within the statutes; all which they have declared must also be proved on the trial.

3 *Mod.* 112. *Rol. Abr.* 60. *pl.* 11. 62.

Foreign-
ers may
be bank-
rupts.

An *Irishman* trading and contracting debts in *England*, and coming over here, may have a commission issued against him, at the petition of the creditors here; and the *Irish* creditors also upon the commission may come in and prove their debts. And, generally, if a person carries on a trade in any place belonging to the crown of *Great-Britain*, and comes into *England*, a commission may be taken out by the creditors in *England*. And there have been several instances, where persons belonging to the plantations abroad, and which is their sole place of residence, yet happening to be in *England*, have had commissions of bankruptcy taken out against them here. 1 *Atk.* 82.

Bankrupt
laws ex-
tended to
aliens.

The benefits, as well as the penal parts of the bankrupt laws, are extended as well to aliens and denizens as to natural-born subjects, being intended entirely for the protection of trade, in which aliens are often as deeply concerned as natives. 2 *Blackst. Com.* 474, 475.

Bankers,
brokers,
and fac-
tors may
be bank-
rupts.

Bankers, brokers, and factors, are liable to the statutes concerning bankrupts, 5 *G.* 2. *c.* 30. *f.* 39, continued to the first of *June* 1793, by the 28 *G.* 3. *c.* 24. *f.* 2. and from thence to the end of the then next sessions of parliament.

And arti-
ficers.

Though artificers differ from those who buy and sell, yet they may be bankrupts. *Str.* 514.

Inferior
trades-
men.

Though the trade be a very inferior one, yet if the party gets his living thereby, it will be a sufficient trading to make him bankrupt; as carpenters,

ters, cow-keepers, vintners. *Com. Dig.* 521. 3 *Mod. Rep.* 155. *Goodinge* 13.

Lord chancellor *Hardwicke* inclined to think a pawn-broker within the several statutes concerning bankrupts. *Atk. Rep.* 206. *pl.* 109. Pawn-brokers.

Those who do not sell the same wares they buy, but convert them to saleable commodities and then sell them; as bakers, brewers, clothiers, goldsmiths, ironmongers, locksmiths, milliners, nailers, salesmen, shoemakers, smiths, tanners, and the like, though part of their gain is by bodily labour, and not by buying and selling, yet they are within the statutes of bankrupt; for the labour is only in melioration of the commodity, and rendering it more fit for sale. *Com. Dig.* 330. 3 *Mod. Rep.* 330. *Com. Dig.* 521. 2 *Blackst. Com.* 476, &c. Buyers who convert wares into other commodities.

If a person deals for some time in a trade and afterwards quits it, leaving his stock in the hands of another, and shares with the other in profit and loss, and after such quitting becomes indebted, and conceals himself from his creditors, he is a bankrupt. *Burr. Rep.* 6, 8. Quitting trade.

A man who leaves off trade may be bankrupt for debts contracted before, but not for debts contracted after. *Lord Raym.* 287.

A clergyman, if he trades, may be a bankrupt. *Atk. Rep.* 198. Clergyman.

If a public officer, as an exciseman, &c. is a trader, he makes himself subject to the statutes of bankrupt. *Atk. Rep.* 206. *pl.* 109.

A *feme covert* in London, being a sole trader, according to the custom, is liable to a commission of bankrupt. 2 *Blackst. Com.* 477. Feme covert.

In the case of *Lavie* and another, assignees of *Jane Cox*, a bankrupt, v. *Phillips* and others, assignees of *John Cox*, a bankrupt. *M.* 6. *G.* 3. It was adjudged in the court of king's bench, present lord *Mansfield*, *Wilmot*, *Yates* and *Aston*, that a commission may be taken out against a *feme covert* as a sole trader. 3 *Burr.* 1776.

A bar-

Barrister. A barrister who had a colliery, and dealt in coals at *Durham*, was held such a trader as might be a bankrupt. *Str.* 514.

Attorney. An attorney at law is within the above case, and may be bankrupt by buying and selling merchandize in the way of trade. *Salk.* 12. *pl.* 2. *Carth.* 82.

Members of parliament may be bankrupts. Merchants, bankers, &c. having privilege of parliament, were not, till 1763, compellable to pay their *just debts*, or become bankrupts, on account of the freedom of their persons from arrests upon civil process; but now any creditor of sufficient value of such merchants, &c. observing the directions of the stat. 4 G. 3. may sue out a commission of bankrupt against any such merchant, &c. and proceed thereon as against other bankrupts.

And stat. 4 G. 3. c. 35. s. 4. declares, that nothing in that act shall subject any person entitled to privilege of parliament, to be arrested or imprisoned, during the time of such privilege, except in cases made *felony by the bankrupt acts*.

A peer may be bankrupt Lord *Hardwicke* said, a commission of bankrupt formerly issued against a peer, an earl of *Suffolk*, for trading in wines; and, though there might be some particular powers that commissioners of bankrupts could not exercise against a peer, he might be liable to a commission of bankrupt, if he would trade. *Atk. Rep.* 201.

Physicians. The statutes relating to bankrupts have been adjudged to extend to physicians, who have traded or merchandized.

Private gentlemen. They also extend to private gentlemen, though never bred up to trade, but have only invested their money in it, in order to make better interest thereof; notwithstanding they have never acted or appeared in the trade, or been known to those who traded with the person to whom they so lent the money, or been personally concerned in the buying and selling any goods whatsoever.

Persons

Persons using the trade or profession of a scri-
vener, receiving other men's monies or estates into
his trust or custody, may be bankrupt. *Rel. Abr.* 59.

pl. 6. Atk. Rep. 142, 143.

Smuggling and running of goods, though con-
trary to act of parliament, is a trading within the
meaning of the bankrupt acts, and such trader is
liable to a commission. *Atk. Rep.* 198, 199.

III. Who are not liable to be Bankrupts.

Buying and selling, in order to promote a busi-
ness which does not make a trader, will not cause
a man to be bankrupt. *Str.* 514.

Nor buying and selling in general, unless the
party's principal means of living be gained there-
by: therefore if a *farmer* buys beasts, corn, and
hay, and afterwards sells them, he cannot be
bankrupt; for his principal means of living is
by his labour, and not by his buying and selling.
5 G. 2. c. 30. f. 40. Salk. 110. *Str.* 513.

Nor a *drover*, or a *grazier*, as such; for, though
they also buy and sell beasts, &c. in the course of
husbandry, yet trade is not their principal, but
only a collateral object; and the subjecting them to
the laws of bankruptcy, might be a means of de-
feating their landlords of the security which the
law has given them above all others, for the
payment of their reserved rents. *5 G. 2. c. 30.*
f. 40.

Before the temporary statute of *5 G. 2. c. 30.*
which is continued by *28 G. 3. c. 4.* to the 1st
of *June* 1793, and from thence to the end of the
then next session of parliament, a *drover* was with-
in the description of a bankrupt.

No receiver-general of any taxes, granted by act
of parliament, shall be deemed a bankrupt. *5 G. 2.*
c. 30. f. 40.

Buying and selling under particular restraints, or
for particular purposes, will not make a man a
bankrupt: *Buyers for parti-
cular purposes.*

bankrupt; as if a commissioner of the navy uses to buy victuals for the fleet, and disposes of the surplus and refuse, he is not thereby made a trader within the statutes. *Skin. 292. Ventr. 270.*

Buyers
only or
sellers
only.

A man who lives by *buying only*, and not selling, cannot be bankrupt; or by *selling only*; but it must be by both *buying and selling*, and also getting a livelihood by it; as by exercising the calling of a merchant, a grocer, or mercer, or in one general word, a *chapman*, a person who buys and sells any thing. Nor will one single act of buying or selling make a man a trader; but it must be a repeated practice and profit by it. *Com. Dig. 5. 2 Blackst. Com. 476.*

It must be a general trading, and of personal things; therefore if a man purchases and sells lands, or if he be a butler, steward to the king, to the inns of court, &c. or a farmer of the customs, excise, &c. such cannot be a bankrupt. *Com. Dig. 522. Skin. 292.*

No member of the bank of *England*, of the *East-India* or *English* linen company; nor any person circulating exchequer bills; nor any adventurer in the royal fishing trade, or in the *Guinea* company, nor any member of the *London Assurance*, or *Royal Exchange*, or *South-Sea* companies, shall be deemed bankrupt on account of his stock in the said companies. *2 Blackst. Com. 476. 13 and 14 C. 2. c. 24. f. 3. 4 G. 3. c. 27. f. 13. 6 G. c. 18. f. 10. 9 Ann. c. 21. 5 G. c. 19.*

Garden-
ers, gold-
beaters,
gun-
founders,
husband-
men, and
weavers,
not
liable.

No handicraft occupation, where nothing is bought and sold (and therefore an extensive credit for the stock in trade is not necessary to be had) will make a man a bankrupt; as that of a *gardener*, *gold-beater*, *gun-founder*, *husbandman*, *weaver*, and the like, who are paid for their work and labour. *2 Blackst. Com. 476. Stone 120. Show. Rep. 270. Cro. Jac. 585. pl. 6. Cro. Car. 31.*

Nor an
innkeep-
er or vic-
tualler.

An *inn-keeper* or *viualler* cannot, as such, be a bankrupt; for his gain or livelihood does not arise from

from buying and selling in the merchandize, but greatly from the use of his house, furniture, attendance, and the like ; and though he may buy corn and victuals to sell again at a profit, yet that no more makes him a trader, than a school-master or other person is, who keeps a boarding-house, and makes considerable gains by buying and selling what he spends in the house ; and such a person is clearly not within the statute. 2 *Blackst.* 476. *Burr. Mansf.* 2064.

An infant under the age of twenty-one years, Nor an though a trader, cannot be made a bankrupt with infant. respect to debts contracted during his infancy, though the act of bankruptcy be committed after he was of age ; for an infant can owe nothing but for necessaries ; and no person can make a bankrupt for debts which he is not liable by law to pay. *T. at Nisi Pri.* 37. *S. P.* 2 *Blackst. Com.* 12 *Mod.* 243.

Lord chancellor *King* was clear of opinion that an infant could not be a bankrupt. *Sal. Cas. in Chanc.* 46, 47.

Having part a in ship will not make the party a Nor a trader, unless he freight it ; nor if he freights it, if person he does not get so much as is due upon the bottom having part in a ship. for repairs ; nor will the having a share in a barge, or stage coach, which are let to hire ; nor will having some stock in the ship make the party a merchant ; because it is frequent for persons to adventure some particular things in such a ship for such a voyage ; and by the statutes of bankrupt, professed merchants are only meant, who are in constant trading. *T. Raym.* 287. *Salk.* 109, 110.

Sutlers to armies are not liable to the bankrupt laws. 3 *Kep. Rep.* 451. *pl.* 16.

Mere working *taylors* are not within the statutes of Workin *taylors.* bankrupts, because it is not by buying and selling that they get their living, but by making garments for their customers, who send them the materials they work upon. *Read. Stat Law.* 185.

Nor are mere working *carpenters*, because they are only labourers. *Comb.* 74.

IV. *Issuing the Commission, and choosing Assignees.*

Stat. 5 G. 2. c. 30. will be frequently referred to under the title of bankrupts, it may be necessary to observe that it is a temporary act, though it has been regularly continued from time to time: and by the 28 G. 3. c. 24. s. 2. it is continued in force to June 1, 1793, and from thence to the end of the then next session of parliament.

For what debts a commission shall be issued. By the above-mentioned act of 5 G. 2. c. 30. s. 23, it is enacted, that no commission of bankrupt shall be issued on the petition of one or more creditors, unless the single debt of such creditor, or of two or more being partners, amount to 100*l.* or unless the debts of two creditors petitioning, amount to 150*l.* or unless the debts of three or more creditors, petitioning, amount to two hundred pounds; and the creditors petitioning shall, before the same be granted, make affidavit, or solemn affirmation, before one of the masters in Chancery, of the truth of their debts, and such affidavit shall be filed by the proper officer.

Smaller debts not considerable enough. The law does not consider persons whose debts amount to less, to be traders considerable enough, either to enjoy the benefit of the statutes themselves, or to entitle the creditors, for the benefit of public commerce, to demand the distribution of their effects. 2 *Blackst. Com.* 475.

Further directions. The creditor or creditors petitioning shall also give 200*l.* bond to the lord chancellor for proving the debt, as well before the commissioners as upon a trial at law, if the due issuing of the commission shall be contested, and also for proving the party a bankrupt, and further to proceed on such commission as hereafter is mentioned; and, if it shall appear that the commission was taken out fraudulently, the lord chancellor may order satisfaction, and may assign such bond to the party injured. *Id.*

Debts must be legal. The petitioning creditor's debt must be a legal one, and therefore an assignee of a bond cannot obtain

tain a commission, nor must it be of above six years standing. 2 Str. 899. *Moseley* 37.

A bankrupt petitioned to supersede the commission against him, because the petitioning creditor's debt arose only from a note that had been indorsed to him after the petitioner had committed an act of bankruptcy; but, as it appeared that the note itself was given *before* any act of bankruptcy, though indorsed *after*, lord chancellor *Hardwicke* thought it a debt upon which the petitioning creditor might take out the commission. *Atk. Rep.* 73. pl. 27. *Id.* 127. pl. 70.

Debt on a note not due.

An arbitration bond is a debt at law, and binds the parties, till set aside by the corruption or partiality, and is also a sufficient debt to support a commission of bankruptcy. *Atk. Rep.* 241.

An arbitration bond.

The lord chancellor may appoint such honest discreet persons as to him shall seem good, to be commissioners. 13 *Eliz. c.* 7. s. 2.

Commissioners oath.

Which commissioners, before they act, shall administer to each other the following oath: "I *A.* " *B.* do swear, that I will faithfully, impartially, " and honestly, according to the best of my skill " and knowledge, execute the several powers and " trusts reposed in me as a commissioner, in a " commission of bankrupt against *C. D.* and this " without favour or affection, prejudice or malice. So help me God." 5 *G. 2. c.* 30. s. 43.

And they shall keep a memorial thereof, signed by them, amongst the proceedings, *Id.* s. 44.

The commissioners shall also cause notice of the commission being issued, to be given in the Gazette, and also notice in writing to be left at the bankrupt's usual place of abode, or personal notice to be given if he is in prison. *Id.* s.

Notice in the Gazette.

In which notice shall be appointed a time and place of meeting of the commissioners; which meeting shall be at three several times within forty-two days, the last of which shall be on the forty-second day; within which time the bankrupt shall surrender himself, and discover his estate and effects. *Id.* s. 1, 2.

Meetings appointed.

A bank-

Punish-
ment for
not ap-
pearing
and sub-
mitting
to be ex-
amined
in 42
days.

A bankrupt who does not within forty days after notice in writing, of a commission being awarded and issued against him, such notice being left at his usual place of abode, or of personal service if he be then in prison, and notice given in the London Gazette that such commission is issued, and of the time and place of the meeting of the commissioners therein named, surrender himself to them, and sign or subscribe such surrender, and submit to be examined from time to time upon oath, or, being one of the people called Quakers, upon solemn affirmation, before the commissioners, and in all things conform to the several statutes made and now in force concerning bankrupts (being thereof lawfully convicted by *judgment* or *information*) shall suffer as a felon, without benefit of clergy. *Id.*

Time en-
larged.

The great seal may, however, enlarge the bankrupt's time for surrendering himself, and disclosing and discovering his effects, to fifty days from the end of the forty-two days, so as the order be made six days before the expiration of the forty-two. *Id. f. 3.*

Creditors
have
their
choice to
come in
or not.

A creditor has his choice whether he will come in under the commission or not; but, if he chooses to come in, he cannot also proceed at law for the same debt: therefore if the creditor has the bankrupt in execution, he must discharge him from the execution, before he can be admitted as a creditor under the commission; and a petitioning creditor, by the very petition, has made his election. *2 Atk. 83. 152.*

The mo-
ney with
whom to
be lodg-
ed.

Before assignees are chosen, the major part in value of the creditors may direct how and with whom the money to be received shall remain, till divided; to which the assignees shall conform, as often as 100*l.* shall be got in. *5 G. 2. c. 30. f. 32.*

Choosing
assignees.

The commissioners, after notice given in the Gazette that a commission has issued against the bankrupt, shall forthwith appoint a time and place for the creditors to meet to choose assignees of the bankrupt's estate and effects; which meeting for *London*, and all places within the bills of mortality,

shall be at the Guildhall of the said city. 5 G. 2.
c. 30. s. 26.

Fourteen days at least ought to be allowed from what the notice in the Gazettee of the issuing the commission, to give the bankrupt's creditors, in what time shall be allowed, ever part of the kingdom they may reside, an opportunity of being present at, and voting in the choice.

They are thus immediately to appoint a time and place for the choice of assignees, because it may be necessary to take care of the bankrupt's estate and effects: and it must not be laid down as a rule, that, because some of the creditors are beyond sea, therefore they must at all events have an opportunity of voting in the choice, and the creditors be directed to proceed to a new one: if this was to prevail, the choice must be postponed to a great length of time, which would be directly contrary to the act of parliament; and therefore the rule is, that the assignees ought to be continued, unless some objection can be shewn with regard to the substance or integrity of the person who is chosen assignee. *Atk. Rep. 92.*

Lord chancellor *Hardwicke* said, that the commissioners, upon the day for choice of assignees, were not critically to examine into the debt, but to admit creditors upon their oath for what they swore was due to them, as they would still be liable to an account afterwards; and that besides, it would be extremely hard to exclude persons who might perhaps be the greatest creditors, till the account was settled, which might be the work of several years: and it might be necessary and convenient that assignees should immediately be chosen, and it was not necessary that the assignees should have proved any debts under the commission, or that they should be even creditors at large of the bankrupt. *Atk. Rep. 70, 71, 153.*

The creditor or creditors who shall sue out the commission, shall prosecute the same at their own expence, till assignees be chosen; and the commissioners

Expedition is required in choosing assignees.

Creditors not obliged to settle the account before they vote.

Expences of the commission.

fioners

✓ sioners shall, at the meeting for chusing assignees, ascertain such costs, and by writing under their hands, order the assignees to reimburse the same, out of the first effects that shall be got in. 5 G. 2. c. 30. s. 25.

Who
shall vote
for as-
signees.

At such meeting for choosing assignees, the commissioners shall admit the proof of any creditor's debt, who lives remote from the place of meeting, by affidavit; and also permit any person, duly authorized by letter of attorney from such creditors, (oath being made of the due execution thereof, either by affidavit sworn before a master in Chancery, or before the commissioners *viva voce*; and in case of creditors residing in foreign parts, such affidavits to be made before a magistrate where the party shall be residing, and together with such creditor's letters of attorney, to be attested by a notary public) to vote in the choice of an assignee or assignees in the place of such creditor: and every creditor shall be admitted to prove his debt, without paying any thing for the same; and the commissioners shall assign the estate and effects unto such person or persons as the major part in value of the creditors, according to the debts then proved, shall choose. 5 G. 2. c. 30. s. 25, 26.

But no creditor shall be entitled to vote, whose debt shall not amount to 10*l*. *Id.* s. 27.

✓ A person guilty of usury, cannot come in to prove his debt as a *bona fide* creditor under the commission, for the whole debt is void. 2 *Vez.* 489. *Atk.* 125.

Debts payable upon a contingency, which may never happen, cannot be proved under a commission of bankruptcy. 3 *Wils. C. B.* 270.

Where a bond conditioned for the payment of a sum of money, by a principal and surety, has not been forfeited till after the bankruptcy of the surety, the debt cannot be proved under his commission, and therefore he may be sued upon it, notwithstanding his certificate, the debt as to him being contingent. 1 *Doug* 16.

The

The commissioners may from time to time ap-
 point new assignees, if the major part of the cre-
 ditors, whose debts amount to 10*l.* shall think fit;
 and the former assignees shall assign to them in ten
 days after notice of such choice, and of the new
 assignees acceptance thereof, signified under their
 hands, on pain of 200*l.* to the creditors, with full
 costs. 5 G. 2. c. 30. s. 30.

Choosing
 new as-
 signees.

And the lord chancellor, on petition of any cre-
 ditors, may order former assignments to be vacated,
 and new assignments to be made of the effects not
 received; and the commissioners shall cause public
 notice to be given in the two *London Gazettes* im-
 mediately following the removal of the assignees,
 and the appointment of others, that the former as-
 signees are removed, and others appointed in their
 stead, and that the bankrupt's debtors do not pay
 their debts to the assignees removed. *Same Stat.* 31.

Notice
 thereof
 to be
 given.

And such new assignees, on filing a supplemental
 bill, shall be entitled to the benefit of the proceed-
 ings, in a suit begun in the time of the first as-
 signees. 1 *Atk.* 88.

V. Examination of the Bankrupt, his Wife, and others.

Upon certificate under the hands and seals of the
 commissioners, that such commission is issued, and
 such person proved before them to become bankrupt,
 it shall be lawful for any judge, or justice of the
 peace. and they are required, upon application
 made, to grant their warrant for the taking and ap-
 prehending such person, and him to commit to the
 common gaol of the county where he shall be ap-
 prehended, there to remain until he be removed by
 order of the commissioners by their warrant; and
 the gaoler, to whose custody such person shall be
 committed, is required to give notice to one or
 more of the commissioners, of such person being in
 his custody; whereupon they shall send their war-
 rant to him to deliver him to the person who shall

Bank-
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 dering,
 to be
 commit-
 ted.

be named in the warrant, who shall convey him to the commissioners to be examined; and the commissioners, by such or any other warrant, may seize the goods and papers of such bankrupt, which shall be in any prison; the necessary wearing apparel of such bankrupt, or of his wife or children, excepted. 5 G. 2. c. 30. s. 14.

But if any person so apprehended shall, within the time allowed, submit to be examined, and conform as if he had surrendered, he shall have the benefit of this act, as if he had voluntarily come in. *Id.* s. 15.

Hence it seems that the bankrupt shall not be apprehended or committed until he shall have made default in not surrendering and making discovery, after due notice as aforesaid.

Every bankrupt, after assignees shall have been appointed, shall deliver upon oath or affirmation, before a master in Chancery, or a justice of the peace, unto such assignees, all books of account, papers, and writings not seized by the messenger of the commission, and not before delivered up, and then in his power, and discover such as are in the power of others that may any way concern his estate; and being not in custody, shall at all times attend the assignees, on reasonable notice given to him in writing, or left for him at his place of abode, in order to assist in making out the accounts of his estate. 5 G. 2. c. 30. s. 4.

Bank-
rupt to
be at li-
berty to
inspect
his pa-
pers.

And such bankrupt, having surrendered, shall, at seasonable times, before the expiration of the said forty-two days, or such further term as shall be allowed to finish his examination, be at liberty to inspect his papers, in presence of the assignees, or some person appointed by them, and to bring with him for his assistance such persons as he may think fit, not exceeding two at a time, and to make extracts and copies from thence, the better to enable him to discover his effects. And in order thereto, the said bankrupt shall be free from arrest or imprisonment.

And shall
be freed
from ar-
rest.

prisonment of his creditors in coming to surrender, and from his surrender, for the said forty-two days, or such further term as shall be allowed, provided he was not in custody at the time of surrender; and if he be arrested for debt, or on an escape warrant, coming to surrender, or after surrender within the said term, then, on producing the summons, under the hands of the commissioners or assignees, to the officer who shall arrest him, and making it appear to such officer that such notice is signed by them, and giving the officer a copy thereof, he shall be immediately discharged: and if any officer shall in such case detain such bankrupt, he shall forfeit to him for his own use 5*l.* a day, for every day he shall detain him, by action of debt, with full costs. *Id.* *f.* 5.

If any bankrupt be in prison or custody at the time of issuing the commission, and is willing to submit to be examined, and can be brought before the commissioners and creditors, the expence thereof shall be paid out of his estate: but if such bankrupt is in execution, or cannot be brought before the commissioners, the commissioners shall attend him in prison, and the assignees are required to appoint a person to attend him in prison, and to produce him his books and papers, in order to prepare his last discovery and examination: a copy whereof the assignees shall apply for, and the bankrupt shall deliver to them, ten days before such last examination. *Id.* *f.* 6.

And the commissioners may examine on oath, as well by *word of mouth* as by *interrogatories in writing*, every such bankrupt, touching all matters relating to his trade, dealing, lands, tenements, goods, chattels, effects, debts, bills, bonds, books of account, and such other things as may tend to disclose his estate, or secret grants, conveyances, and eloigning of his lands, tenements, goods, money, and debts, as the commissioners shall think meet; and they may also examine, in manner aforesaid, every person duly summoned before or present at

Bank-
rupt in
prison
when the
commis-
sion is is-
sued.

Bank-
rupt to
be exam-
ined by
word of
mouth,
or inter-
rogato-
ries.

any of their meetings, touching all matters relating to the person, trade, dealings, estate, and effects of the bankrupt, and any act of bankruptcy committed by him, and also reduce into writing the answers of verbal examinations of the bankrupt, or other person, had or taken before them; which examination, so reduced into writing, the party examined shall sign and subscribe. 5 G. 2. c. 30. s. 6, 16. *Atk. Rep.* 200. *Wils. Rep.* 611.

Bank-
rupt,
or other
person
refusing
to answer

If any bankrupt or other person shall refuse to answer, or shall not fully answer to the satisfaction of the commissioners, all lawful questions put to him by the commissioners, as well by word of mouth as on interrogatories in writing, or shall refuse to sign and subscribe his examination so reduced into writing (not having a reasonable objection either to the wording thereof, or otherwise, to be allowed by the commissioners), they may, by warrant under their hands and seals, commit him to such prison as they shall think fit, there to remain without bail or main-prise, until he shall submit himself to the commissioners, and full answer make to their satisfaction to all such questions as shall be put to him (which questions must be specified in the warrant of commitment), and until he shall sign and subscribe his examination. 5 G. 2. c. 30. s. 16. 1 *Jac. c.* 15. s. 2. *Atk. Rep.* 200.

H. 1. G. 3. K. v.—John Perrot. The defendant was brought before the court of King's Bench, from *Newgate*, by *habeas*, to get discharged from a commitment made by his commissioners under a commission issued against him, for not submitting himself to them, and making a full answer to the questions put to him, to their satisfaction. The question put to the bankrupt by the commissioners was in these words, *viz.* “As you do admit that you have spent the last week previous to this your examination with Mr. *Maynard* (one of your assignees) to settle and adjust your accounts, and to draw up a true state thereof, to enable you to close
“ such

“ such your examination ; and do likewise admit,
 “ that on such state thereof it appears, that after
 “ giving you credit for all sums of money paid by
 “ you, and making you debtor for all goods sold
 “ and delivered to you, from your first entering
 “ into trade to the time of your bankruptcy, there
 “ is a deficiency of the sum of 13,513*l.* give a true and
 “ particular account what is become of the same, and
 “ how and in what manner you have applied and dis-
 “ posed thereof.” To this question the bankrupt
 gave the following general answer, viz.

“ On the goods sold this last year, I have lost up-
 “ wards of 200*l.* and by *mournings*, I have lost up-
 “ wards of 100*l.* and for nine or ten years I have
 “ been *extremely extravagant*, and spent large sums
 “ of money.” J. P.

His counsel *urged* to the court as a ground for his discharge, 1st, That the answer which he had given before the commissioners was a *full, sufficient, and satisfactory* answer, and *the best and only one* that could be given by an idle extravagant man, who had never kept any accounts ; and consequently, that imprisoning him until he shall give a more full and satisfactory answer to the question, was an imprisonment for life. 2dly. That the *power and jurisdiction* of the commissioners to take the bankrupt's examination, &c. was *temporary and confined* to the time allowed to the bankrupt to come in and surrender himself, and submit to be examined, after which the commissioners had no further power over the bankrupt at all ; and in support of this objection, his counsel relied on the construction of the bankrupt acts, and particularly stat. 5 G. 2. c. 30, s. 1, 2, 3. The counsel for the commissioners, &c. insisted, 1st, That the bankrupt's answer was *nugatory and insufficient*. 2dly. That the construction put by the bankrupt's counsel on the bankrupt acts was false, and contrary to the genuine spirit and construction of those acts ; and, if allowed, would pervert their very end and intent. Lord Mansfield : If the question put to the bankrupt by the commissioners was improper ;

improper ; or if proper, and the answer satisfactory, he ought to be discharged ; but this is a proper question, and the answer is very *insufficient* and *unsatisfactory*. The construction put by the defendant's counsel in objection to the commitment, is founded on mere arbitrary implication ; the legislature says no such thing. *Stat. 5 G. 2. c. 30. s. 16.* gives the commissioners a power to commit the bankrupt until he shall submit, and a full answer make to their satisfaction. The 17th *s.* of that statute gives power to the court, or judge, to re-commit the bankrupt to the same prison, there to remain as aforesaid, until he shall conform as aforesaid. His examination is not confined to be within the time limited for the bankrupt to come in, surrender, and submit to be examined. The power of the commissioners is general, and not limited to the compass of time given the bankrupt to come in. In this case, the commissioners have, within the limited time, required a further answer of the bankrupt to their question, and committed him for his refusal ; I am clearly satisfied that he cannot redeem himself from his imprisonment but by giving a full answer to the question. If he gives a full answer, and the commissioners are not satisfied with it, he will then be entitled to his proper remedy. *Foster and Wilmot*, Justices, concurred with the chief justice. By the court unanimously, Let the defendant be remanded. *Burr. Mansf. 1122.*

Note. The bankrupt was brought up again by *habeas corpus* in *Trinity* term following, but remanded because his answer to the commissioners was *incomplete* and *unsatisfactory*. *Burr. Mansf. 1215.*

The commitment of a bankrupt not pursuing the words of the statute, the prisoner must be discharged ; as in *Bracy's case*. *M. 8 W.*

A gaoler suffering a bankrupt to escape, after commitment, or to go without the walls or doors of the prison, shall, on conviction, by indictment or information, forfeit 500*l.* to the creditors, 5 *G. 2. c. 30. s. 18.*

And by the same statute, *f.* 19. the gaoler shall, on the request of any creditor who shall have proved his debt, and shewing a certificate thereof under the hands of the commissioners, produce him to such creditor, on pain of 100*l.* to the creditors, by action of debt.

By the same statute, *f.* 4, it is enacted, that if any bankrupt shall not, on his examination, fully discover all his estate, and how disposed of, except what has been *bona fide* disposed of in the way of his trade and dealings, and except what has been laid out in the ordinary expence of his family, and also deliver up to them all his effects (except the necessary wearing apparel of himself, his wife, and children: then in case of any default and wilful omission in not surrendering and submitting to be examined, and if he shall conceal or embezzle any part of his estate to the value of 20*l.* or any books of account, or writings relative thereto, with intent to defraud his creditors, and be thereof convicted by indictment or information, he shall be guilty of felony without benefit of clergy, and the estate shall go among the creditors seeking relief under such commission.

Every person who shall have accepted of any trust, and shall wilfully conceal any estate of any bankrupt, and shall not within forty-two days after the commission shall issue, and notice given in the Gazette, discover such trust and estate in writing, to one or more of the commissioners or assignees, and submit to be examined (if required), shall forfeit 100*l.* and double the value of the estate concealed, to the creditors, by action of debt, with full costs. 5 G. 2 c. 30. *f.* 21.

The assignees of a bankrupt, suspecting that such bankrupt, had made concealment, examined a great many of his relations at Guildhall, and brought a bill in chancery against the very same persons for discovery of those concealments: Mr. Green, the counsel on the part of the defendants, moved that they might be

be allowed to look into their depositions before the commissioners, in order to make their answer consistent. But Lord *Hardwicke* would not grant the motion; observing, that as truth was always uppermost, they might, if they pleased, put in an answer consistent with what they had already sworn in their depositions, supposing them true; if false, they swore at their own peril, and would not permit them to see them, merely for their own security, that they might not swear differently in one, from what they had done in the other. *Atk. Rep.* 289, *pl.* 157.

Bank-
rupt's
wife may
be exa-
mined.

The commissioners may examine, upon oath, the wife of the bankrupt, respecting a discovery of his estate, goods, and chattels, concealed, kept, or disposed of by his wife, in her own person, or by her own act or means, or by any other person; and she shall incur such danger and penalty for not coming before the commissioners, or for refusing to be sworn and examined, or for not disclosing the truth upon her examination, as by former laws are made and provided against any other person in the like case. *21 Jac. c. 19. s. 6.*

But not
touching
her hus-
band's
bank-
ruptcy.

But the wife cannot be examined against her husband touching his bankruptcy, or whether he had committed any act of bankruptcy, or as to how or when he became a bankrupt; and if the commissioners commit her, and though the warrant of commitment mentions it to be, as well for refusing to discover the goods of the bankrupt, as the time and manner of his bankruptcy, yet the commitment was held illegal, and the wife ordered to be discharged. *Wil. Rep.* 610. *12 Vin. Abr.* 11. *p.* 28.

VI. Disposal of the Bankrupt's Estate.

Bank-
rupt's ef-
fects to
be dis-
posed of
by sale
or other-
wise.

The commissioners shall have power by their discretions, to take such order with the lands of such bankrupt, as well copy or customaryhold as freehold, which he had in his own right before he became a bankrupt, or which he purchased jointly with his wife or child to the only use of such bankrupt,

rupt; and also with all his money, goods, chattels, wares, and merchandizes, and cause all the same to be searched and appraised to the best value they may, and the same to be sold by deed indented, and inrolled in a court of record, or otherwise ordered for payment of the creditors.

13 *Eliz. c. 7. f. 2.*

And the commissioners may, by deed indented, ^{Estate} and inrolled at *Westminster*, in six months, sell the ^{in tail.} bankrupt's estate in tail, whereof no reversion or remainder is in the king, or of the king's gift; which sale shall be good against all persons whom the bankrupt by common recovery or otherwise might cut off. 21 *Jac. c. 19. f. 12.*

If any bankrupt shall convey or assure any lands ^{Mortga-} or estate, to any persons, on condition or power of ^{ged es-} redemption at a day to come, by payment of money ^{tate may} or otherwise, the commissioners, before the time of ^{be re-} deemed. the performance of such condition, may appoint, under their hands and seals, any person or persons to make tender or payment of money, or other performance, as fully as the bankrupt might have done; and the commissioners shall, after such tender or performance, have power to sell such redeemed estate for the benefit of the creditors, as fully as they might sell any other estate of the bankrupt.

21 *Jac. c. 19. f. 13.*

Persons who purchase copyhold or customary ^{Custom-} lands shall pay a fine to the lord of the manor, who ^{ary lands,} shall hereupon admit them. 13 *Eliz. c. 7. f. 4.*

To save the expence of two fines, lord chancellor *Hardwicke* recommended in such case, to leave out the copyhold estate in the assignment; and then the commissioners, when they can meet with a purchaser, may convey to him in the first instance. 1 *Atk. 96.*

Effects which a bankrupt has, as executor only, ^{Effects as} shall not be applied to the use of the creditors, but ^{executor.} shall go according to the directions of the testator.

1 *Atk. 101.*

Money owing out o *England* to a bankrupt, may
M be

be attached by the law of the place, after the bankruptcy, for a debt due before it. 1 *Doug.* 170.

Commis-
sioners
may
break
open the
doors of
the bank-
rupt.
The commissioners, or any other person or officer by them deputed and appointed, by their warrant under their hands and seals, may brake open the house, chambers, shops, warehouses, doors, trunks, or chests of the bankrupt, where any of his goods or estate shall be or reputed to be, and seize any of his goods, wares, merchandizes, (necessary wearing apparel for himself, his wife, and children, excepted,) and any of his books, papers, or writings, which shall be in his custody or possession. 21 *Jac. c.* 19. *f.* 8. 2 *Show. Rep.* 247. *pl.* 248. 5 *G. 2. c.* 30. *f.* 14.

Punish-
ment for
fraudul-
ently
convey-
ing lands,
&c.

And, by the 21 *Jac. c.* 19. *f.* 7. if any bankrupt shall, upon his examination before the commissioners, be found fraudulently to have conveyed away his lands, goods, or other estate, to the value of 20*l.* to defraud or hinder his creditors of the same, and shall not discover the same, and (if it lie in his power) deliver the same to the commissioners; or if he cannot make it appear to the commissioners that he has sustained some casual loss, whereby he is disabled to pay what he oweth, he may be indicted at the assizes or sessions, and upon conviction he shall be set upon the pillory in some public place for two hours, and have one of his ears nailed to the pillory, and cut off.

Convey-
ing e-
states,
&c. to
hildr en.

And if a bankrupt shall convey to any of his children, or other persons, any manors, lands, goods, or transfer his debts into other men's names, except the same shall be conveyed or transferred on marriage of any of his children, or for some valuable consideration, the commissioners may sell or dispose thereof in as ample a manner as if such bankrupt had been actually seised or possessed thereof. 1 *Jac. c.* 15. *f.* 5.

Reward
for disco-
very of
any thing
concealed.

Any person who shall, after the time allowed for surrender, voluntarily make discovery to the commissioners or assignees, of any part of a bankrupt's estate, not before come to the knowledge of the assignees,

assignees, shall be allowed *5l. per cent.* and such farther reward as the assignees, and the major part of the creditors in value, present at any meeting of the creditors, shall think fit. 5 G. 2. c. 30. s. 20.

If any bankrupt shall, after the issuing of any commission against him, pay to the person who sued out the same, or deliver to such person goods, or security for his debt, whereby such person suing out such commission shall privately have more in the pound than the other creditors, such payment, delivery of goods, or giving security, shall be deemed an act of bankruptcy, whereby such commission shall be superseded, and the lord chancellor may award, to any creditor petitioning, another commission; and such person receiving such goods or other satisfaction shall forfeit his whole debt, and the whole he shall have so received, to be distributed among the other creditors. 5 G. 2. c. 30. s. 24.

Bankrupt
com-
pounding
with the
person su-
ing out
the com-
mission.

But a real creditor shall not refund to the assignees any money received of the bankrupt before the issuing of the commission, and when he had no knowledge of his becoming a bankrupt, or being insolvent. 19 G. 2. c. 19. s. 1.

Receiv-
ing mo-
ney of a
bank-
rupt.

By the 21 Jac. c. 19. s. 11. if any person becoming bankrupt shall at that time, by the consent of the owner, have in his possession and disposition any goods whereof he shall be reputed owner, and take upon him the sale or disposition thereof as owner, the commissioners shall have power to sell the same for the benefit of the creditors, as fully as any other part of the estate of the bankrupt.

Goods of
others.

Where it shall appear that there has been mutual credit given, or mutual debts between the bankrupt and any other person, the commissioners or assignees shall state the accounts, and one debt may be set against another, and the balance of such account shall be claimed or paid. 5 G. 2. c. 30. s. 28.

Commis-
sioners
may state
accounts.

But lord *Hardwicke* said, *A*, a debtor to a bankrupt before his bankruptcy, and a creditor to him upon a contingency that took place after the bankruptcy, should not be at liberty to set off under this clause. *Atk. Rep.* 119.

Mutual
debts and
credits.

Balance
only to be
claimed or
paid.

Lord chancellor *Coxe* said, that, where there was mutual credit between a bankrupt and a creditor, the balance should only be paid, and that the clause of the statute was not to be construed of dealings in trade only, or in case of mutual running accounts, but also where one credit was upon mortgage, and the other upon note; observing that, in all cases of mutual credit, it was natural justice and equity that only the balance should be paid. *Wil. Rep.* 326.

Lord chancellor *King* was of opinion, that joint debts could not be set against a separate demand due to the bankrupt, this case not being within stat. 2 G. 2. c. 22. s. 13.

Separate
and joint
creditors.

Separate creditors are allowed to come in under a joint commission; but the joint effects are first to be applied to pay the partnership debts, and then the separate debts; and as to the separate effects, first the separate creditors, and afterwards the partnership creditors, are to be paid out of the same. *Atk. Rep.* 67. pl. 22. 2 *Vern.* 706. pl. 628.

Proving
under
different
commis-
sions.

A. gives a promissory note for 200*l.* payable to *B.*, or order; *B.* indorses it to *C.*, who indorses it to *D.*—*A.*, *B.*, and *C.*, became bankrupts, and *D.* received 5*s.* in the pound, on a dividend made by the assignees of *A.* Lord chancellor *King* ordered *D.* to come in as a creditor for 150*l.* only, out of *B.*'s effects. 2 *Wil. Rep.* 407. pl. 129.

Lord chancellor *Hardwicke* was also clearly of the same opinion, on another occasion. *Atk. Rep.* 137.

Debt due
to the
king.

If any lands, goods, or other estate of any bankrupt, shall be extended after he becomes a bankrupt, under colour of his being an accountant and indebted to the king, it shall be lawful for the commissioners to examine upon oath, whether the said debt were due to such debtor or accountant, upon any bargain or contract originally made between such accountant and the said bankrupt: and if such bargain or contract was originally made with any other person than the said accountant, or for the use of any other person, the commissioners' proceedings shall

shall be available against the said extent. 21 Jac. c. 19. s. 10.

Otherwise, an extent of the crown is available against a commission of bankruptcy, the crown not being within the statutes of bankrupts. 1 Atk. 262.

A mortgagee of land may choose whether he will come in as a creditor under the commission, or not; for such creditor, having a real security in his own hands, is entirely safe; as he has property in the land mortgaged, precedent to the translation of the property to the commissioners, who in such case have only an equity of redemption, and are in no better condition than the bankrupt himself. 2 Blackst. Com. 487. Bac. Abr. 258. Rep. Temp. Finch, 466.

Debt on
Mort-
gage.

Any creditor, having security for his debts by judgment, statute, recognizance, specialty, with penalty or without, or other security, or having no security, or having made attachments in London, or other place, of the goods of such bankrupt, whereof there is no execution or extent served and executed upon the lands, goods, and estate of such bankrupt, before he shall become bankrupt, shall not be relieved upon any such judgment, &c. for more than a rateable part of their debts, with the other creditors, without respect to any penalty contained in such judgments, or other security. 21 Jac. c. 19. s. 9.

Persons
having
security
can have
only their
propor-
tion.

Upon the equity of the statute of 8 Ann. c. 14 (which directs that, upon all executions of goods being upon any premises demised to a tenant, one year's rent and no more shall, if due, be paid to the landlord), it has been held that, under a commission of bankrupt, which is in the nature of a statute execution, the landlord shall be allowed his arrears of rent to the same amount; in preference to other creditors, even though he has neglected to distrain, while the goods remained on the premises. Wil. Rep. 739. Atk. Rep. 104. 2 Blackst. Com. 487.

Landlord
for his ar-
rears of
rent.

A landlord is not restricted to one year only, as in the case of executions, but may distrain for his whole arrear. 1 Atk. 102, 103.

If

Where
there are
not goods
sufficient.

If there are not sufficient goods upon the premises to pay the landlord's rent, he can then only take what goods there are on the premises; and, after they are appraised and sold, as the law in cases of distress for rents directs, then the landlord may come in as a creditor for the rent remaining due to him, with the rest of the creditors under the commission.

But if the landlord of a bankrupt suffers the assignees to sell off the goods, he is not entitled to his whole rent, but must come in with the other creditors under the commission. *Atk. Rep.* 102.

Servants.

Commissioners generally recommend to the assignees to pay the whole of the wages to menial servants; but where the wages of clerks and other superior servants are large, and the arrears long, they should come in as common creditors. *Green's Sp. of Bank. Laws.*

Securities
for money
not due.

Every person who shall give credit on securities, payable at a future day, for goods delivered to persons who shall become bankrupts before the time of payment, shall be admitted to prove their securities or agreements, and shall have a dividend in the same proportion as the other creditors, deducting interest from the time of payment to the time it would have become due. 7 G. c. 31. s. 1.

H. 29. G. 3. Sadlau v. the assignees of Tyler. This was an issue directed out of the court of Chancery, to try whether any and what debt was due to the plaintiff, at the time Mrs. Tyler committed an act of bankruptcy. It was tried before lord Kenyon at the sittings after last term; and on the facts disclosed in evidence, a special case was reserved for the opinion of the court. It seems that Mrs. Tyler, before her credit in the city was lost, had borrowed from the plaintiff 10,000*l.* stock, in the 3 per cent. consols, promising to replace it at a certain time. The stock was accordingly sold out; but before it was replaced, Mrs. Tyler committed an act of bankruptcy; and the question was, Whether, as this replacing of the stock was to be made at a future day, which

which had not arrived at the time the act of bankruptcy was committed, the loan of it formed such a legal debt as was capable of being proved under the commission, by virtue of the statute 7 G. 1. c. 31. After hearing the arguments of Mr. *Grant* on the one side, and Mr. *Manley* on the other, the court gave their opinions *seriatim*. Lord *Kenyon*, Mr. justice *Buller*, and Mr. justice *Grose*, were of opinion, that it was a debt proveable under the commission; and that the amount of it might be calculated from the price at which 3 per cent. consols sold at on the day the act of bankruptcy was committed. But Mr. justice *Abbott* conceived, that, as this money could not have been recovered by *indebitatus assumpsit*, but that the plaintiff could only recover the amount in damages by an action on the case, it could not be considered as a debt due at the time of the bankruptcy. The idea, however, that the form of action was the just criterion in these cases, was denied by the rest of the court; and the judgment was given for the plaintiff. MS.

By the 19 G. 2. c. 32. s. 2. the obligee in any bottomree, or *respondentia* bond, and persons assured in a policy of insurance, shall be admitted to claim; and, after the loss or contingency, to prove the debt thereon, as if the same had happened before the issuing of the commission. Bottom-
reeinsur-
ance.

Lord chancellor *King*, *Talbot*, and *Hardwicke*, Appren-
tice. ordered an apprentice, whose master became bankrupt, to be admitted as a creditor under the commission, on account of the apprentice-fee received by the master, only for the remaining sum, after deducting for the time he had lived with the bankrupt. Lord *Raym.* 1352. *Str.* 582. *Atk. Rep.* 261.

Debts carrying interest, shall bear interest to the date of the commission; but note-creditors cannot prove interest upon them, unless it is so expressed in the body of the notes. Even at law, where notes are for value received, and interest is not expressed, the jury do not, in an action upon the notes, give the plaintiff interest for them, but by way of damages Debts
which
carry in-
terest.

ages only; and commissioners of bankrupts cannot award damages. 1 *Atk.* 151, 259.

Assignees
to keep
books.

The assignees shall be obliged to keep books of account, wherein they shall enter all sums of money, or other effects, which they shall have received out of the bankrupt's estate; which every creditor, who has proved his debt, may inspect at all seasonable times. 5 *G. 2. c. 30. s. 26.*

Assignees
in some
cases an-
swerable
for losses.

Assignees are not answerable for losses occasioned by their own necessary acts; but if an assignee trusts a person with the payment of money, who fails, and the money is lost, such assignee shall be answerable over to the creditors, unless he consulted the body of the creditors in the appointment of such agent. 1 *Atk.* 87.

Swearing
to a false
debt.

If any person shall swear or affirm that any sum of money is due to him from the bankrupt, which is not really due, knowing the same to be not due, he shall suffer the penalties inflicted by the statutes against wilful perjury, and shall be liable to pay double the sum so sworn or affirmed to be due. 5 *G. 2. c. 30. s. 29.*

First divi-
dend.

Persons chosen assignees shall, after the expiration of four months, and within twelve months from the time of issuing the commission, cause at least twenty-one days notice to be given in the Gazette, of the time and place the commissioners and assignees intend to meet to make a dividend; at which time the creditors, who have not proved their debts, shall be at liberty to prove them; and the assignees shall produce fair accounts, and be sworn to them, before the commissioners, if required by the creditors; and they shall be allowed all reasonable expences; and the commissioners shall order such part of the neat produce of the bankrupt's estate in the hands of the assignees, as they shall think fit, to be divided amongst the creditors, and shall make such order for a dividend in writing, and shall cause one part of such order to be filed amongst the proceedings under the commission, and shall deliver to each of the assignees

assignees a duplicate of such order; which order shall contain an account of the time and place of making such order, and the sum total of the debts proved, as well as the sum total of the money remaining in the hands of the assignees, and how much in the pound is then ordered to be paid; and the assignees, in pursuance of such order, and without any deed of distribution, shall forthwith make such dividend, and take receipts for the same in a book to be kept for that purpose. 5 G. 2. c. 30. s. 33.

And by the 13 Eliz. c. 7. s. 2. every one of the creditors shall be paid a portion, rate like, according to their debts.

Upon the common equity of the court of Chancery, if creditors will make an affidavit that they have not read the Gazette, they will be admitted, so as not to disturb the former dividend, and by that means must, in the first place, be brought up equal to the creditors under the former dividend, before the commissioners can proceed to make a second. *Atk. Rep. 209.*

Within eighteen months after issuing the commission, the assignees shall make a second dividend, in case the estate was not wholly divided upon the first, and shall cause notice to be inserted in the Gazette, of the time and place the commissioners intend to meet to make a second dividend, and for the creditors, who shall not before have proved their debts, to come and prove the same: and, at such meeting, the assignees shall produce their account on oath; and what upon the balance shall appear to be in their hands, shall, by order of the commissioners, be forthwith divided; which second dividend shall be final, unless any suit shall be depending, or any part of the estate standing out that cannot have been disposed of, or that the major part of the creditors shall not have agreed to be sold, or unless some other or future estate of the bankrupt shall afterwards come to the assignees; in which case the assignees shall, as soon as may be, convert such future estate into

N

money,

money, and shall within two months after, by the like order of the commissioners, divide the same. 5 G. 2. c. 30. s. 27.

It seems that the word *future* should be expunged; for lord *Hardwicke* said, if a bankrupt, *after his discharge*, got *future* effects, in point of justice and conscience he ought to make good the deficiency, though *no* court of equity would do it for the creditor. *Atk. Rep.* 256.

Bank-
rupt's al-
lowance.

A bankrupt who shall surrender and conform, shall be allowed 5*l.* *per cent.* out of the neat produce of the estate that shall be received, if, after such allowance, the neat produce of his estate will pay 10*s.* in the pound, so as the said 5*l.* *per cent.* shall not amount to above 200*l.* 5 G. 2. c. 30. s. 7.

If his estate will produce 12*s.* 6*d.* in the pound, he shall be allowed 7*l.* 10*s.* *per cent.* so as it does not exceed 300*l.* *Id.*

If it will pay 15*s.* in the pound, the bankrupt shall be allowed 10*l.* *per cent.* so as such allowance does not exceed 300*l.* *Id.*

And if the bankrupt's estate will pay 15*s.* in the pound, he shall be discharged from all the debts by him owing at the time he became bankrupt: and if he shall be arrested or prosecuted for any debt due before that time, he shall be discharged on common bail, and may plead in general, that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence; and the certificate of his conforming, and allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining the certificate; and a verdict shall pass for the defendant, unless the plaintiff can prove that the certificate was obtained fraudulently, or can make appear a concealment by the bankrupt to the value of 10*l.*; and if the plaintiff is cast, the defendant shall have full costs. 5 G. 2. c. 30. s. 7.

But

But if any commission of bankruptcy shall issue ^{On a second bankruptcy.} against any person who shall have been discharged by this act, or shall have compounded with his creditors, or delivered to them his estate, and been released by them, or been discharged by an act of insolvency, then the body only of such person conforming shall be free from arrest and imprisonment, but his future estate shall remain liable to his creditors (his tools of trade, necessary household goods and furniture, and necessary wearing apparel of himself and wife and children only excepted), unless his estate shall produce clear of all charges 15s. in the pound. *Id.* f. 9.

A person against whom a second commission of bankrupt has been issued, who has not paid fifteen shillings in the pound, is liable to an action by any of his creditors, notwithstanding they have signed his certificate. This was determined in the case of *Philpot. v. Caden*, before Lord Kenyon in the Court of King's Bench. *Trin.* 33. G. 3. M. S.

But if the neat produce of the bankrupt's estate shall not amount to 10s. in the pound, such bankrupt shall not be allowed 5l. per cent. but shall be allowed so much as the assignees and commissioners shall think fit, not exceeding 3l. per cent. f. 8.

But any such allowance shall not be paid to the bankrupt till a final dividend shall be made, because, till that time, creditors may continue to come in to prove their debts. 1 *Atk.* 208.

VII. The Bankrupt's Certificate and Discharge.

No discovery on oath shall entitle the bankrupt ^{Certificate and allowance.} to the said allowance, unless the commissioners shall, under their hands and seals, certify to the lord chancellor, that he hath made a full discovery of his estate, and in all things conformed himself; and that there doth not appear to them any reason to doubt of the truth of such discovery, or that the same is not a full discovery of all his estate and effects,

effects, and unless four parts in five in number and value of the creditors, who shall be creditors for not less than 20*l*. and who have proved their debts under the commission, or some person by them authorised thereto, shall sign such certificate, and testify their consent to such allowance and certificate, and to the bankrupt's discharge, to be also certified by the commissioners; but the commissioners shall not certify the same, till they have proof by affidavit of such creditors, or of the person by them respectively authorised, signing the said certificate, and of the power by which any person is so authorised (and the letter of attorney of a creditor residing in foreign parts, attested by a notary public, shall be sufficient evidence in such case of such power); which said affidavit, together with such power to sign, shall be laid before the lord chancellor with the certificate in order for allowing the same; and unless the bankrupt make oath that the certificate and consent of the creditors were obtained fairly and without fraud, and unless the certificate shall, after such oath, be allowed and confirmed by the lord chancellor, or two of the judges to whom he shall refer it; and any of the creditors shall be allowed to be heard against making the certificate, and against the confirmation of it; nor shall any commissioner sign the certificate, till after four parts in five in number and value of the creditors shall have signed it. 5 G. 2. c. 30. s. 10. 24 G. 2. c. 37. s. 10.

Every security given to the use of any creditor, to induce him to sign such allowance or certificate, shall be void. 5 G. 2. c. 30. s. 10.

If a creditor has taken money for signing a bankrupt's certificate, it may be recovered back in an action for money had and received, because of the oppression. *Doug.* 472.

An agreement to pay money to the assignees of a bankrupt, on his certificate being allowed, though for the benefit of *all* the creditors, is void. *Doug.* 695.

If some of the bankrupt's creditors are induced by money to sign the certificate, though the bankrupt does not know of it at the time of their signing, nor even when he makes the necessary affidavit in order to obtain the allowance by the chancellor, yet if he knows it before the actual allowance, the certificate is void. 1 *Doug.* 228.

Induced by money to sign the certificate,

If money is given without the bankrupt's privity, to induce creditors to sign in order to deprive him of the effect of his certificate, and sufficient in number and value have signed, exclusive of those who have taken the money, the certificate shall be valid. 1 *Doug.* 280.

Even without the bankrupt's privity.

And no bankrupt shall be entitled to such allowance, who hath upon marriage of any child given above 100*l.* unless he prove by his books, or upon his oath, that he had remaining at the time, sufficient to pay his full debts; or who hath lost in one day the value of 5*l.* or in the whole the value of 100*l.* in twelve months next before his becoming bankrupt; at cards, dice, tables, tennis, bowls, billiards, shovelboard, cock-fighting, horse-races, dog-matches, foot races, or other pastime or game, or in bearing a part in the stakes, or by betting; or hath within one year before he became a bankrupt lost 100*l.* by contracts for stock or shares of any public funds, where such contract was not to be performed within one week from the making, or where the stock was not actually transferred. *Id.* f. 12.

Further conditions of such allowance.

If any person shall fraudulently swear or depose, before the major part of the commissioners, or by affidavit exhibited to them, that a sum of money is due to him from the bankrupt which shall not be really owing, and shall in respect of such fictitious debt sign the certificate for such bankrupt's discharge; in such case, unless the bankrupt shall, before the major part of the commissioners have signed the certificate, by writing signed by him, and delivered to one or more of the commissioners or assignees, disclose the fraud, and object to the reality of

Penalty for not disclosing fictitious debts that may be sworn.

of such debt, the certificate shall be void, and the bankrupt shall not be intitled to his discharge or allowance. 24 G. 2. c. 57. s. 9.

By 14 G. 3. c. 77. s. 59, and 15 G. 3. c. 38. s. 69. those bankrupts who have conformed to all the laws relating to them, and cannot obtain their discharge, may petition the court of chancery.

Allowing
and con-
firming
the certi-
ficate

After the certificate is signed by the creditors and commissioners, it shall be laid before the lord chancellor, together with the affidavit or affirmation of the creditors signing the same, or the persons by them respectively authorized so to do, and also the warrant or authority to sign, in order for the allowing and confirming thereof; which certificate, upon the bankrupt's making oath, or being of the people called quakers, solemnly affirming in writing, that the same, and the consent of the creditors thereunto, were obtained fairly and without fraud, may be allowed and confirmed by the lord chancellor: but any creditor of the bankrupt may, if he thinks fit, petition the lord chancellor not to confirm the certificate; on which account the lord chancellor gives notice in the Gazette, that, by virtue of the stat. 5 G. 2. c. 30. the certificate will be allowed and confirmed, as the said act directs, unless cause be shewn to the contrary, within twenty-one days from the said advertisement.

Any creditor, though his debt is under 20*l.* has a right to petition against the allowance. 2 Burr. Rep. 728.

By the 18 G. 3. c. 52. s. 76. the lord chancellor is empowered to allow certificates to bankrupts, though not signed by four-fifths of their creditors.

Bankrupt
to attend
and settle
accounts.

The bankrupt, after allowance of the certificate, shall attend, on notice in writing from the assignees, to settle accounts, and shall have 2*s.* 6*d.* a day allowed for attendance; and, if he shall neglect or refuse, he shall, on oath made by the assignees before the commissioners, be apprehended and committed to close gaol, by warrant of the said commissioners, till he conform. 5 G. 2. c. 30. s. 36.

No

No money shall be paid out of the effects for the eating or drinking of the commissioners, or of any other person, nor shall the commissioners have more than 20s. each for each meeting, nor shall any schedule be annexed to the deed of assignment. Commissioners acting contrary hereto shall be for ever incapable of acting as such. *Id. f. 42.*

If by the death of commissioners, or otherwise, it is found necessary to renew the commission, half fees only shall be paid. *Id. f. 45.*

All certificates which have been allowed and entered of record, or a true copy of every certificate signed and attested, may be given in evidence in any court of record, and, without further proof, taken to be a bar and discharge against any action for any debt contracted before the issuing of the commission, unless any creditor of the person, who has the certificate, can prove it was fraudently obtained, *Id. f. 41.*

Copy of certificate a bar against any action for debt.

All bills of fees or disbursements demanded by any solicitor, clerk, or attorney, shall be settled and certified by a master in chancery, who shall receive for the same 20s. *Id. f. 46.*

When the commissioners have assigned the bankrupt's estate, and given him his certificate and discharge, they have executed their power.

By the 1 *Jac. c. 15. f. 17.* if the bankrupt die before distribution, that shall not hinder such distribution.

A certificate allowed in the lifetime of the bankrupt is good, though not confirmed by the chancellor till after his death; for the operative force of it arises from the consent of the creditors; and, when confirmed, it has its effect from the beginning. 1 *Atk. 77.*

And the allowance to the bankrupt, being a vested interest, shall go to his executor. 2 *Atk. 208.*

But where a legacy has been left to a bankrupt, after the signing of the certificate, and before it was confirmed and allowed, such legacy has been adjudged

to

to the creditors, as in the case of *Tudway v. Bourn*,
H. 32 G. 2. 2 Burr. 716.

By the 5 G. 2. c. 30. s. 45. the commission shall
 not abate by the death of the king.

Commencing suits.

No suit in equity shall be commenced by the
 assignees, without the consent of the major part in
 value of the creditors, who shall be present at a
 meeting of the creditors, pursuant to a notice in the
 gazette. *Id. s. 38.*

Bankrupt's discharge.

If any bankrupt, who shall have obtained his cer-
 tificate, shall be taken in execution, or detained in
 prison on account of any debts owing before he be-
 came bankrupt, by reason that judgment was ob-
 tained before such certificate was allowed; any one
 of the judges of the court, wherein judgment has
 been so obtained, on such bankrupt's producing his
 certificate allowed and confirmed, may order any
 sheriff or gaoler, who shall have such bankrupt in
 custody, to discharge him without fee. *Id. s. 13.*

Proceedings of record.

The lord chancellor, on petition, may order the
 proceedings to be entered of record, to be at any
 time produced as evidence. *s. 41.*

Commissioners to pay the overplus.

The commissioners, on the lawful request of the
 bankrupt, shall declare how they have bestowed his
 lands and goods, and pay him the overplus, if any
 there be. *13 Eliz. c. 7. s. 4.*

If a commissioner should be sued for any thing
 done on the statute of *13 Eliz.* and *1 Jac.* he may
 plead the general issue, and if he recovers, he shall
 have his costs. *1 Jac. c. 13. s. 16.*

But there is no provision for any thing done by
 them, or by the assignees, on any of the subsequent
 statutes. *1 Burn, 177.*

A bankrupt's certificate will discharge him from
 a judgment obtained *after* his bankruptcy, on a debt
 due *before*. *2 Str. 1196.*

It will also discharge him from a bond for pay-
 ment of money by instalments, though some of them
 were not payable till *after* the bankruptcy, if any of
 them were *due before*; for after the first default of
 payment,

payment, the bond became forfeited, and the penalty was the debt at law. *Barnes's Notes. C. P. 82, 87, 261, 202.*

A certificate discharges the person of a bankrupt, and his estate subsequently accrued. *Atk. 77.*

Where a person, discharged by the insolvent debtors act, becomes bankrupt afterwards, his commission will be special, and will only discharge his person, not his future estate and effects. *Atk. Rep. 257. pl. 138.*

The bankrupt's certificate does not discharge him from a bond of indemnity, where the breach happens after the bankruptcy. *2 Str. 1160.*

Nor will it discharge him from debts which he owes as an executor. *Atk. Rep. 101. pl. 50. Wil. Rep. 254.*

The certificate of one bankrupt partner does not discharge the other. *10. Ann. c. 15. s. 3.*

Becoming bankrupt, and not having received his certificate, does not disqualify a corporator. *H. 32. G. 2. K. v. the Mayor, Bayliffs, and Common Council of the town of Liverpool. 2 Burr. 723.*

No debtor shall be prejudiced by the payment of his debt to the bankrupt before he hath notice, or it is notorious that he is bankrupt. *Stat. 1 Jac. 1. c. 15.* Paying to bankrupt.

Bills of Exchange, and Promissory Notes.

A BILL of exchange, says *Savary*, is a piece of paper commonly long and narrow, on which is written a short order, given by a banker, merchant, trader, or other person, for paying to such a person, or to his order, or also, in some countries, to the bearer in a distant place, a sum of money equivalent to that which such a banker, merchant, or other trader has received in his dwelling place. *Dict. Tr. and Com. 253. Savary's Dict. tit. Lettre de Change.* What is a bill of exchange.

O

The

The form, however, is not an essential part of it, for the same strictness and nicety are not required in penning bills current between merchant and merchant, as in deeds, wills, &c. On the other hand it may happen, that a writing may have the form of a bill of exchange, and yet be otherwise. 3 *New Abr.* 606.

Further
definition.

A regular bill of exchange is a mercantile contract, in which four persons are concerned, viz. 1. The drawer, who receives the value; 2. His debtor, in a distant place, upon whom the bill is drawn, and who must accept and pay it; 3. The person who gives value for the bill, to whose order it is to be paid; and, 4. The person to whom it is ordered to be paid, creditor to the third. *Blag.* 4.

Foreign
or inland

Bills of exchange are either *foreign* or *inland*; foreign when drawn by a merchant, residing abroad, upon his correspondent in *England*, or *vice versa*; and *inland* when both the drawer and the drawee reside within the kingdom. Foreign bills of exchange were formerly much more regarded in the eye of the law than inland ones, as being thought of more public concern in the advancement of trade and commerce. But now inland bills of exchange are put upon the same footing as foreign ones; what was the law and custom of merchants with regard to the one, and taken notice of merely as such, being by the statutes expressly enacted with regard to the other; so that there is now, in law, no difference between them.

Promis-
sory
notes.

A promissory note, or note of hand, is an engagement in writing, to pay a sum specified, at the time therein limited, to a person therein named, or sometimes to his order, or often to the bearer at large: this is also made assignable and endorsable like a bill of exchange.

By whom
to be
drawn.

A bill of exchange must be in writing, and drawn by the party, or a person having legal authority from him; and such drawing raises a contract to pay the same, without reference to any

any other transaction, promise or obligation, betwixt the parties, whereby a pretence may be made for not honouring the bill when due. 3 *New Abr.* 606. *Salk.* 128.

The means for payment of a draft or note, must be founded upon some obvious principle of certainty. Thus an order or promise of payment out of money *when received*, or the produce of merchandize *when disposed of*, is no bill of exchange; because of the *uncertainty* whether one will be received, or the other disposed of; or that its produce, when disposed of, would be sufficient. *Blackst.* 782. 3 *Wils.* 207. Precision required.

E. 14 G. 2. Beardesley v. Baldwin. A promissory note to pay money within so many days after the defendant should marry, was (on consideration) held not to be a negotiable note within the statute. 2 *Str.* 115.

So where a bill drawn by an officer upon his agent, requiring him to pay so much out of his *growing subsistence*, was held no bill of exchange, nor the drawer liable, though he accepted such bill; for it concerns neither trade nor credit, but is to be paid out of the growing subsistence of the drawer; so that if the party die, or the fund be taken away, the payment is to cease and determine. *L. Raym.* 1361. 1 *G. 1. Jocelyn v. Laferre.*

E. 14 G. 2. Smith v. Abbot. The defendant accepted a bill of exchange to pay it when the goods consigned to him, and for which the bill was drawn, were sold: and the plaintiff declared on the custom of merchants. After a verdict for the plaintiff, it was moved in arrest of judgment, that this acceptance depending on the contingency of the sale of the goods, was not within the custom of merchants, or negotiable. But the court (on consideration) held it good; for though the plaintiff might have refused to take such an acceptance, and have protested the bill; yet nobody can say he might not submit to it. And it will affect trade, if factors are

Bill on a contingency.

not allowed to use this caution, when *bills* are drawn before they have an opportunity to dispose of the goods: a man who is drawn on to pay at ten days sight, may accept for thirty: *Molloy* 304. though the other might protest the *bill*. *Salk.* 129. *Cumb.* 452. 2 *Str.* 1152.

Further
illus-
trated.

But if *A.* give a note, &c. to *B.* for the payment of a sum of money when he the said *A.* should marry such a one, *B.* cannot bring an action on such note, and declare as on a bill of exchange, setting forth the custom of merchants, &c. because there is no such custom, being only an agreement founded on a marriage brokerage, and to pay money on a collateral contingency; which contingency cannot be called trading, so as to come within the custom of merchants. 4 *Mod.* 242. *Comb.* 227. *S. C.* *Pearson ver. Garret.*

To pay
when a
person is
of age.

An order or promise to pay when *A. B.* shall come of age, specifying the day when that event is to happen, is a good bill or note, because it is payable though he die in the interim.

Half-pay
when
due.

So an order, &c. to pay money as the drawer's quarter's half-pay by advance before the pay will be due, is a good bill, because payable though the half-pay should never become due. *Macleod v. Suee,* & *al. Ld. Raym.* 1481.

Pay to me or my order so much, is a bill of exchange, if accepted; and this is the way to make a bill of exchange without the intervention of a third person. 1 *Salk.* 130. *Trin.* 2 *Ann.* *B. R. Buler v. Grips.*

The drawing of a bill of exchange is sufficient to bring the drawer within the custom of merchants. 1 *Salk.* 125.

Bills
drawn by
gentle-
men.

It has been resolved, that a bill of exchange drawn by a gentleman, who is no trader, shall, notwithstanding make him responsible within the custom of merchants; or persons of distinction travelling abroad would suffer in their credit; and it might bring a general inconvenience on trade itself, when it came to be known to foreign merchants, that there were

were some, who, though they took upon themselves to draw bills of exchange, yet were not liable to the payment thereof. *Carth.* 82. 1 *Show.* 125. *Witherly* ver. *Sarsfield.* *Comb.* 45, 152. S. C.

A bill of exchange payable to bearer, and endorsed, is a bill of exchange against an endorser, and he is equally liable. 1 *Ld. Raym.* 743. 1 *Salk.* 125. Payable to bearer.

The custom of merchants, in relation to foreign bills of exchange, seems to have prevailed time out of mind. But though the custom of merchants, in relation to bills of exchange, be established by the common law, and such bills, being securities for money, are of great credit among them, they are not securities of so high a nature as bonds or specialities, and have been adjudged within the statute of limitations. 3 *New Abr.* 602. *Carth.* 3. Custom of merchants respecting foreign bills.

Bills of exchange are usually drawn payable at sight, so many days after date, or at single, double, or treble, usance; and it is frequent to draw two or three, if abroad, or to be sent abroad, for the same sum, and of the same date, for fear of loss or miscarriage, which are called a set, and carry a condition with them that only one shall be paid. When a bill thus consists of a set, or several parts, each must be delivered to the person in whose favour it is made, otherwise he will not be able to negotiate it at any usance, nor in all cases to enforce payment. A set of bills.

3 *New Abr.* 603. *Molloy*, b. 2. cap. 10. sect. 10.

All foreign countries with which we are in the habit of negotiating bills, compute their time as we do, except Russia, which still adheres to the old style. A bill therefore drawn at a place using one style, and payable at a place using the other, if the time is to be reckoned from the date, it shall be computed according to the style of the place at which it was drawn, otherwise according to the style of the place where it is payable; and in the former case the date must be reduced or carried forward to the style of the place where the bill is payable, and the time reckoned from thence. *Mar.* 2 *Edit.* 22, 25. Computation of style.

Thus,

Thus, on a bill dated the first of March old style, and payable here one month after date, the time must be computed from the 19th of February, new style; and on a bill dated the 19th of February, new style, and payable at Petersburg one month after date, from the first of March, old style. In all cases, where the time after the expiration of which a bill or note imports to be payable is limited by months, it is to be computed by *calendar*, not lunar months. *Mar. 2 Edit. 19.*

Usance.

Instead of an express limitation by months or days, we continually find the time on bills drawn or payable at Amsterdam, Rotterdam, Hamburgh, Altona, Paris, or any place in France, Cadiz, Madrid, Bilboa, Leghorn, Genoa, or Venice, limited by the *usance*, that is, the usage between those places and this country: because, in the infancy of bills, all bills between this country and any of those places respectively, were usually made payable after the same interval. An *usance* between this kingdom and Amsterdam, Rotterdam, Hamburgh, Altona, Paris, or any place in France, is one calendar month from the date of the bill; an *usance* between us and Cadiz, Madrid, or Bilboa, two; and an *usance* between us and Leghorn, Genoa, or Venice, three. A double *usance* is double the accustomed time; an half *usance*, half. Upon an half *usance*, if it be necessary to divide a month, the division, notwithstanding the difference in the length of months, shall contain fifteen days. *Blag. 13.*

Usance is generally understood to mean only a month. *Molloy. 207. 1 Shaw. 217.*

And yet, by varying according to the customs of particular countries, it is always necessary that the *usance* of the place should be particularly described; for, where the plaintiff declared on a bill of exchange drawn at Amsterdam, payable at London, at *two usances*, and did not shew what the two *usances* were, judgment was given for the defendant. *1 Salk. 131.*

Inland

Inland bills of exchange are those drawn by one merchant residing in one part of the kingdom, on another residing in some city or town within the same kingdom; and these also being found useful to trade and commerce, have been established on the same foot with foreign bills; but at common law they differ from them in this, that there was no custom of protesting them, so as to subject the drawer to interest and damages in case of non-payment, as there was on foreign bills. 3 *New Abr.* 603. 1 *Salk.* 131. *Borough v. Perkins.*

An attempt was made to remedy this inconvenience, by the 9 and 10 *W. c.* 17: but that proving also defective, with respect to the regulation of protests, it was enacted by the 3 and 4 *Anne, c.* 9, that in case of a party's refusing to underwrite a bill of exchange, such bill may be protested for non-acceptance. And it is thereby further provided, that no acceptance of inland bills of exchange shall be sufficient, unless the same be under-written, nor the drawer thereof liable to costs, &c. And that no protest shall be necessary for non-payment, unless the bill be drawn for 20*l.* or upwards. It is thereby also enacted, that if any person accept any such bill of exchange, in satisfaction of any former debt, it shall be esteemed full payment of such debt, if such person doth *not take his due course* to obtain payment thereof, by endeavouring to get the same accepted and paid, and make his protest as aforesaid. Provided that nothing in the said act contained shall extend to *discharge any remedy* that any person may have against the *drawer, acceptor, or indorser*, of such bill.

Every drawer of a bill is liable to the payment thereof, as is every acceptor and endorser. Also if there are several endorsers of the same bill, the last endorsee may bring his action against the first endorser, or any of them; for the endorsement is, as it were, a new bill, or at least a warrant by the endorser that the bill shall be paid. 3 *New Abr.* 607.

If

Inland bills.

May be protested for non-acceptance.

Drawer, acceptor, and endorsers liable.

If a bill be drawn upon *A*, and he accepts it, and afterwards refuses payment, upon which the bill is protested, the person to whom it is payable may bring several actions against the acceptor and drawer; for the protest is no discharge of the acceptor. 3 *New Abr.* 607.

Every endorser of a bill is liable as the first drawer; the endorser is answerable, because the endorsement is in nature of a new bill. 1 *Salk.* 125.

An endorser is not discharged without actual payment of the bill; unless there be some neglect or default in the endorsee, as where he doth not endeavour to receive the money in convenient time, and then the first drawer becomes insolvent. *Ibid.* 132.

An endorser charges himself in the same manner as if he had originally drawn the bill; and a plaintiff need not prove the drawer's hand, as the endorser is to him as a new drawer. 1 *Salk.* 127.

But though the drawer, acceptor, and endorser, are all liable, the party can have but one satisfaction, and till such satisfaction is actually had, he may sue all or any of them. 3 *New Abr.* 607.

Accept-
ing for
the ho-
nour of
the
drawer.

Not only the drawer, acceptor, and endorser, are liable, but also, by the custom of merchants, if one merchant draw a bill which is protested, and another hearing thereof, declare that he, for the honour of the drawer, will pay the contents, and thereupon subscribes in these or the like words: *I the under-writer do bind myself as principal, according to the custom of merchants for the sum mentioned in the bill of exchange whereupon this protest is made, &c.* This shall as effectually bind him, as if he had been the original drawer, and by this the person to whom the bill is payable, has his remedy both against such person as surety, and also against the principal; but the principal, or original drawer, is liable to him who subscribes for his honour. 3 *New Abr.* 608.

If the endorsee of a bill accepts but two-pence from

from the acceptor, he can never resort to the drawer. *Ld. Raym. 743. Tassel and Lee v. Lewis.*

A bill of exchange is entire, and cannot be ap-
portioned and multiplied into several accounts; so ^{Bill of ex-}change is
that if *A* draws a bill of 100*l.* payable to *B*, or ^{entire.} order, *B* cannot assign 50*l.* thereof, so that his
assignee shall have an action for the same. 1 *Ld.*
Raym. 360. Carlt. 466.

If any accident happens by the negligence of the ^{Acci-}holder of a bill of exchange, in prejudice of the ^{dents} drawer, he has lost his remedy against him. ^{from neg-}
1 *Salk. 127.* ^{ligence.}

If an inland bill of exchange be lost, or miscarry, within the time limited for its payment, the drawer shall give another bill of the same tenor, upon security being given to indemnify him in case the bill so lost or miscarried be found again. 9 & 10 *W. 3. c. 17.*

An action may be brought upon a non-accepted bill, before the expiration of the time limited for its payment. If more than one of the persons liable on account of the non-acceptance or non-payment of a bill or note become bankrupts, the holder may prove, under the separate commission of each, the full amount of the money due to him upon the bill or note at the time he makes his proof, and receive dividends under each upon the sums proved until he shall in the whole have received such amount. But, after the receipt of a dividend under one commission, he cannot prove under any of the rest more than the sum remaining due after deducting such dividend. *Blag.*

Where a bill is drawn payable to *A. B.* or bearer, an assignee must sue in the name of him to whom it is made payable, and not in his own name; otherwise a stranger, finding the bill, might recover; if it be made payable to *A. B.* or order, there an assignee must sue in his own name because the order must be made by endorsement, &c. 3 *Salk. 67.*

As to the manner of declaring on a bill of
P exchange,

it seems to be now settled, that the custom of merchants concerning bills of exchange being part of the common law, of which the judges will take notice *ex officio*, it is unnecessary to set forth the custom specially in the declaration; it is sufficient to say, that such a person, *according to the usage and custom of merchants*, drew the bill. 3 *New Abr.* 614.

It seems agreed, that against the drawer an action of debt, or a general *indebitatis assumpsit*, will lie; for, he having received the money, the law raises a contract, and lays him under an obligation to pay it; but it hath been adjudged, that neither an action of debt, nor an *indebitatis assumpsit*, will lie against the acceptor of a bill of exchange, and therefore the remedy against him must be by a special action on the case, founded on the custom of merchants; for the acceptance is only a collateral engagement to pay the debt of another, in the same manner as a promise by a stranger to pay, &c. if the creditor will forbear his debt. 3 *New Abr.* 614. *Hard.* 485.

If one plaintiff be abroad and the others in England, the action must be brought within six years after the cause of action arises.

H. 32 G. 3. Perry and others against Jackson Bart. and others. This was an action on a bill of exchange for 100*l.* by the payees against the drawers. The declaration stated that the defendants on the 24th of November, 1767, at New York in parts beyond the seas, to wit, at London, &c. drew the bill in question, requesting *R. Willis* to pay at 40 days sight the contents to the plaintiffs; that *Willis* in January 1768 refused to accept, and afterwards to pay it; by reason whereof, and according to the usage and custom of merchants the defendants became liable to pay, &c. The defendants pleaded severally the statute of limitations: to which the plaintiffs replied that when the cause of action accrued to the plaintiffs, one of them was abroad in parts beyond the seas and out of the kingdom of Great Britain, to wit, at New York in America; and that he remained so abroad in parts beyond the seas continually from thence until October 1787, when he returned &c; averring that they exhibited their bill within six years after his

his

his return. The defendants demurred generally to these replications.

Baldwin and *Adam* argued in support of the demurrers, and *Wood contra*.

Perry
against
Jackson.

Lord Kenyon, Ch. J. It is rather singular that this is the first time that this question has been brought into a court of law, though the circumstance, upon which the question arises, must have frequently occurred. It being admitted that there is no decided case on this point, it must depend on the reasonable construction to be put upon this act of parliament. The proviso on which the question arises was introduced into this statute in order to protect the interests of those persons which there was no one of competent age, of competent understanding, or competent in point of residence in this country, to protect. Now two of the plaintiffs in this cause have always been resident here: and it was their duty to watch over those interests in which they themselves were equally concerned with the partner who resided abroad. It is admitted that *one partner* may do several acts to bind the interests of all; *he* may release as well as create a debt; *he* may also by his acknowledgment of a debt, take a case out of the statute of limitations; and I see no reason why the same rule should not hold also in the present instance. The third section of this act of parliament limits the time of bringing actions in all cases to six years after the cause of action accrues; the plaintiffs therefore were bound to commence their action at an earlier period, unless they come within the exception in the last clause of the act, by which it is enacted "that if any *person or persons* entitled to such actions &c. be beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they take the same within such time as before limited after their return from beyond the seas as other persons having no such impediment might have done." Now the words of this clause, grammatically speaking, do not apply

Whitcomb v. Whiting.
Doug. 652. 3.
Edit.

to the present case : they only extend to cases where the person individually, a single plaintiff, or *persons*, in the plural, when there are several plaintiffs, are not in a situation to protect their interests. Neither does this case come within the policy of the law which provides that, if parties neglect their interests for such a length of time as six years, they shall lose the benefit of suing to enforce their demands. I am therefore clearly of opinion, both on the words of the act of parliament, and on grounds of policy, that the plaintiffs are barred by the statute of *James*.

Ashhurst, J. The plaintiffs are not now entitled to recover on this bill of exchange, whether their case be considered on the words of the statute, or on the reason of the thing. The plaintiffs do not come within the words of the proviso, as my Lord has already observed : and this statute having been always considered as a beneficial law for the public, we ought not to extend the exceptions in it to a case which does not require it. It was competent to the plaintiffs, who resided in *England*, to bring the action, as well as to release it. And in construing another act of parliament, *viz.* the 14 G. 2. c. 17, s. 3. which requires ten days notice of trial where the defendant resides above 40 miles from *London*, we have determined that if one of the defendants reside within that distance, so long a notice is not necessary. *Buller, J.* declared himself of the same opinion. *Grose, J.* absent. *Durnf & East*. IV. 516.

Acceptance.

Acceptance
binding.

Acceptance, by the custom of merchants, as effectually binds the acceptor as if he had been the original drawer; and, having once accepted it, he cannot afterwards revoke it. *Cro. Jac.* 308.

E. 5 G. 3. Pillan and Rose v. Van Mierop and Hopkins. The acceptance of a bill of exchange is an obligation on the acceptor to pay the same; the
end

end of their institution, their currency, proves it, and requires that it should be so. It is on this principle bills of exchange are considered and declared on as *special* contracts, though *legally* but *simple* contracts. 1 *Stra.* 648.

A very small matter will amount to an acceptance; and any words will be sufficient for that purpose, which shew the party's assent or agreement to pay the bill; as if upon the tender thereof to him, he subscribes, *Accepted*, or *Accepted by me, A. B. or, I accept the bill, and will pay it according to the contents*; these clearly amount to an acceptance. *Molloy, book 2. c. 10. f. 15.* Small matter amounts to an acceptance.

If the party underwrites the bill, *presented* such a day, or only the day of the month, this is such an acknowledgment of the bill as amounts to an acceptance. 3 *New Abr.* 610. *Comb.* 401.

If the party says, *Leave your bill with me, and I will accept it, or, call for it to morrow, and it shall be accepted*; these words, according to the custom of merchants, as effectually bind, as if he had actually signed or subscribed his name according to the usual manner.

But if a man says, *Leave your bill with me; I will look over my accounts and books between the drawer and me, and call to morrow, and accordingly the bill shall be accepted*; this does not amount to a complete acceptance; for the mention of his books and accounts shews plainly that he intended only to accept the bill, in case he had effects of the drawer's in his hands; and so it was ruled by the Lord Chief Justice *Hale* at *Guildhall*. *Molloy, book 2. c. 10. f. 20.*

A foreign bill was drawn on the defendant, and being returned for want of acceptance, the defendant said, that *if the bill came back again he would pay it*; this was ruled a good acceptance. 3 *New Abr.* 610. cites *M. 6 G. Carr v. Coleman*.

The defendant was sued as acceptor of a bill of exchange; and upon the evidence it appeared to be a parol acceptance only, which the Chief Justice ruled Parol acceptance.

ruled to be sufficient, that being good at common law, and the stat. 3 & 4 *Anne*, cap. 9. which requires it to be in writing, in order to charge the drawer with damages and costs, having a proviso that it shall not extend to discharge any remedy that any person may have against the acceptor. Upon this direction, the jury found for the plaintiff; but the Chief Justice of the Common Pleas having lately ruled it otherwise, the court was moved for a new trial: and, in order finally to settle this point, it was ordered to be argued; and after argument, the court was of opinion, that the direction in the present case was right, and agreeable to constant practice, and therefore ordered the *postea* to be delivered to the plaintiff. *Str.* 1000. 8 G. 2. *Lumley v. Palmer.*

Agreement to honour a bill.

An agreement to honour a bill of exchange is virtually an acceptance. The acceptance need not be on the bill, it may be by collateral writing. 3 *Burr.* 1674.

A promise to accept.

A promise to accept a bill of exchange is the same as an actual acceptance; it will bind though the acceptor has no effects in hand, and without consideration. 1 *Stra.* 648.

Not accepted.

If a bill of exchange is not accepted, an action will immediately lie against the drawer, before the time when it is made payable. 1 *Doug.* 55.

Acceptance to be paid at a future day.

A bill was drawn payable the first of *January*; the person upon whom the bill was drawn accepts it to be paid the first of *March*; the servant brings back the bill. The master, perceiving this enlarged acceptance, strikes out the first of *March*, and puts in the first of *January*, and then sends the bill to be paid. The acceptor then refuses. Whereupon the person, to whom the monies were to be paid, strikes out the first of *January*, and puts in the first of *March* again. On an action brought on this bill, the question was, whether these alterations did not destroy the bill? and ruled they did not; but that the bill fell regularly due on the first of *March*.

Per

Per L. Ch. Ju. Pemberton, Price v. Shute. Molloy, b. 2. c. 10. f. 28.

But an agreement to accept on certain conditions is discharged, if the conditions are not complied with. 1 *Doug.* 297.

If a book-keeper, or servant, or other person ^{A servant.} having authority, or who usually transacts business of this nature for the master, accept a bill of exchange, this shall bind such master. 3 *New Abr.* 611.

But another person may accept the bill for the honour of the drawer; and, if he pays the money in default of the party, he is to make a protest with declaration that he hath paid the same for the drawer's honour.

H. 6 G. 2. Jenys v. Fawler. Raymond C. J. at Guildhall. In an action brought by the endorsee of a bill of exchange against the acceptor, ^{Acceptance of a forged bill.} it was held not to be necessary, to prove the hand of the drawer: and the plaintiff rested on the proof of the acceptance. The defendant offered to prove it a forged bill, by calling persons who were acquainted with the hand of the drawer, and would swear they did not believe it to be his hand. But *Raymond* the C. J. would not admit this, from the danger to negotiable notes, and because a man might with design write contrary to his usual method. And he strongly inclined, that even actual proof of a forgery would not excuse the defendants against their own acceptance, which had given credit to the endorsee. Therefore a verdict was found for the plaintiff. 2 *Str.* 946.

By the 7 G. 2, c. 22, if a bill be accepted, and ^{Acceptor dying.} the person who accepted the same happens to die before the time of payment, there must be a demand made of his executors or administrators, and, on non-payment, a protest is to be made, although the money becomes due before there can be administration, &c. A bill may be accepted for part, the party on whom drawn having no other effects in his hands; and there may be a protest for the residue.

Forging

Forged
accep-
tance.

Forging the acceptance of any bill of exchange, or the number or principal sum of any accountable receipt is made felony.

Nothing but an express declaration, by the holder of a bill of exchange, will discharge the acceptor. 1 *Doug.* 247.

Holder of
a forged
bill.

An innocent holder of a forged bill of exchange, for which he has given a valuable consideration, shall recover against the acceptor, who accepted it not knowing of the forgery. 3 *Burr.* 1454.

Where
separate
actions
are
brought
against
the ac-
ceptor
and en-
dorsers.

E. 32 G. 3. Smith against *Woodcock*, and the same against *Dudley*. The first of these was an action by the holder against the drawer of a bill, the second against one of the endorsers. There was also another action pending by the same plaintiff against another endorser, and a fourth action against the acceptor, who had refused payment. A rule *nisi* was obtained on behalf of *Woodcock* and *Dudley*, why upon payment of the amount of the bill and the costs of these two actions, all proceedings should not be staid against them.

Lawes opposed the rule, on the ground that the costs of the other actions should also have been paid. But by the court, that is only necessary when the application for staying proceedings comes from the acceptor, who is the original defaulter, and against whom all the costs occasioned by his default may be recovered. *Durnf, & E. IV.* 691.

Of Endorsements.

Endorse-
ment,
what.

Endorsement is a term known in law, which, by the custom of merchants, transfers the property of the bill or note to the endorsee; and is usually made on the back of the bill, and must be in writing; but the law has not appropriated any set form of words as necessary to this ceremony; therefore, if a man write his name on the back of a bill of exchange, or, *this is to be paid to J. L.* or, *pay the con-*
tents

tents to J. S. and signs his name to it, this is a good endorsement. 3 *New Abr.* 609.

He who makes the endorsement is the endorser, and the person to whom it is endorsed is the endorsee. If a bill or note be paid or transferred over to another person by *delivery* only, the person paying it ceases to be a party in such bill or note; but if he endorses it he becomes to all intents and purposes a new drawer. *Ld. Raym.* 181, 744, 929, 930. 2 *Atk.* 182. *Burr.* 670, 675.

If a bill or note, payable to a man's order, who endorses it, and passes it to a third person, who delivers it to a fourth for a valuable consideration (not in discharge of a former debt) but without his endorsement, it is a sale of the bill, and the holder cannot maintain an action against him. 12 *Mod. Rep.* 241. What is deemed a sale of a bill.

What shall be reasonable notice to the endorser of non-payment by the acceptor of a bill of exchange, or drawer of a promissory note, is for the decision of the jury. 1 *Doug.* 515. 1 *Term Rep.* 167. Reasonable notice to the endorser.

A bill was drawn at six days sight, and presented and accepted the 8th of *February*, which made it payable the 14th, and the three days of grace brought it to the 17th, which was a *Saturday*, and the acceptor stopt payment on the *Tuesday* following, before which the bill was not tendered. And upon this evidence it was left to the jury, who were of opinion, that the drawer was discharged at the end of three days of grace. *Str.* 829. *Coleman v. Sayer.*

If the endorsee of a bill of exchange accepts any sum in part of payment, he can never after resort to the drawer. 1 *Ld. Raym.* 743. Endorsee accepting part.

A man having a bill of exchange, may *verbally* authorise another to endorse his name on it; and when that is done, it is the same as if he had done it himself. 12 *Mod. Rep.* 564.

A bill of exchange, endorsed in blank, being stolen and negotiated, an innocent endorsee for valuable Bill endorsed in blank.

able consideration shall recover upon it against the drawer. 1 *Doug.* 636.

Bill on an
usurious
contract.

A bill of exchange, or promissory note, given upon an usurious contract is void in the hands of an endorsee, though for a valuable consideration, and without notice of the usury. 1 *Doug.* 736.

Demand
of pay-
ment ne-
cessary.

In actions on bills of exchange, brought by an endorsee against an endorser, the plaintiff must prove a demand of, or due diligence to get the money of the acceptor, but need not prove any demand on the drawer. 2 *Burr.* 669.

A note
endorsed,
filled up.

An endorsement written on a blank note, or check, in the form of a bill of exchange or promissory note, will bind the endorser for any sum or time of payment, which the person to whom he entrusts the note so endorsed shall insert in it. 1 *Doug.* 514.

Endorsee
not giving
notice.

In an action upon an inland bill of exchange brought by the endorsee against the drawer, it appeared that the bill was payable the 14th of May; that upon promise of payment, the endorsee gave the acceptor to the 18th, from thence to the 20th, thence to the 24th, and from thence to the 7th of June, when the acceptor failed. And there being no notice to the drawer, the Chief Justice held it to be the loss of the endorsee. *Str.* 702. *Gee v. Brown.* 1 *G.* 2.

A bill of exchange cannot be endorsed for part, so as to subject the party to several actions. 3 *New Abr.* 610. *Carth.* 466. 1 *Salk.* 65.

Bills en-
dorsed
with a fic-
titious
name—
payable
to bearer.

It has lately appeared, that, in the transactions of the house late *Livesy, Hargrave, and Co.* (and it is probably a mode adopted by other houses) that, in order to raise money by bills, and to make those bills more marketable, they caused them to be drawn or dated from the country, payable to the order of a fictitious person whose pretended name they endorsed on the back; and thus giving it the appearance and effect of a bill regularly transferred in the due course of business, it went with a better face

to

to be discounted, and was done without hesitation. One of these bills having become the subject of a most interesting litigation, has led to a decision of great importance to the mercantile world. *Blag.* 36.

This action was brought by the defendants in error, Messrs. *Minet* and *Fellor*, as endorseees of an instrument, purporting to be a bill of exchange, against the plaintiffs in error, *Gibson* and *Johnson*, as the acceptors thereof. The bill was drawn as follows :

Manchester, Feb. 10, 1788.

£. 721. 5. 0.

Three months after date, pay to Mr. John White, or order, seven hundred twenty-one pounds five shillings, value received, with or without advice.

LIVEST. HARGRAVE, and Co.

*To Messrs. Gibson and Johnson,
Bankers, London.*

The cause came on to be tried before *Ld. Kenyon*, and a special jury, at *Guildhall, London*, on *November 3, 1789*, and, after a very full hearing, the jury found a verdict for the plaintiffs, to the amount of the bill.

On the 6th of *November*, the first day of *Michaelmas Term, 1789*, *Mr. Erskine*, on the part of the defendants, *Gibson* and *Johnson*, moved for a new trial, and also arrest of judgment. *Ld. Kenyon* ordered that two rules should come on together, the one for a new trial, and the other in arrest of judgment. This business came on again in the same term, when it was agreed, by the counsel on both sides, to take a special verdict.

In *Michaelmas term, 1789*, this special verdict came to be argued in the court of *King's Bench*, and the court thereupon gave judgment for the debt in error. The judgment of the court was given only on the 5th count of the declaration, which stated the bill as payable to bearer. Upon this judgment,

a writ of error was brought, returnable in parliament. *Ld. Kenyon* said, as the special verdict had found that no such person as *John White* existed, this instrument might be fairly considered as a bill payable to bearer. *Ld. Loughborough* observed that it was found by the special verdict, that this bill was endorsed by the drawers. He contended that from this moment the bill was no longer payable to the order of *White*, therefore this bill was payable to bearer; that *Gibson* and *Johnson*, by accepting this bill, undertook to pay it to whoever should produce it to them with the endorsement of *Livesy, Hargrave, and Co.* and who had paid them, *Livesy, Hargrave, and Co.* a valuable consideration for it. The lord chancellor then put the question; whereupon the judgment of the court of *King's Bench* was affirmed: by which circumstance the law is now understood to be, that if any person accepts a bill, knowing that the bill is payable to a person that is not in existence, such acceptor is bound to pay such bill, as a bill payable to bearer, which in such a case considers all endorsers as mere cyphers.

To the question, proposed to the lords on this case (perhaps from motives of mercy) whether the matter found by the special verdict, as far as it relates to the act done by the defendants *Gibson* and *Johnson*, imported an utterance of the bill, *knowing it to be forged*, the lords made no decision.

Of Protests.

Nature of
a protest.

A protest does not raise any debt, but only serves to give formal notice that the bill is not accepted, or accepted and not paid; and this by the common law was, and is still necessary on every foreign bill before the drawer can be charged; but it was not required on any inland bill, before the stat. 9 & 10 W. 3. Nor does the want of it since that statute destroy

destroy the remedy, which the party had before against the drawer, for the principal. 3 *New Abr. Law*, 612.

If he to whom the bill is to be paid, dies, there can be no protest before a probate of his will, or administration granted; for none but his executors or administrators can give a legal discharge or acquittance for the money, and consequently no other person can sue for or demand the same; and though security be offered to indemnify the drawee against the executors, yet he is not obliged to accept thereof; being a matter left entirely to his consideration, to judge and determine on the sufficiency of such security; and in this case it is said, that if a publick notary protest the bill, an action on the case lies against him. 3 *New Abr. Law*, 612.

If a bill be left with a merchant to accept, which is lost or mislaid, he to whom it is payable, is to request the merchant to give him a note for the payment, according to the time limited in the bill; otherwise there must be two protests, the one for non-acceptance and the other for non-payment; and though such note be given, yet if the merchant happens to fail, there must be a protest for non-payment in order to charge the drawer. 3 *New Abr. Law*, 613.

The use of a protest is only to subject the drawer to answer in case of non-acceptance or non-payment; nor does the same discharge the party-acceptor if once accepted; for the payee, or person to whom payable, hath now two remedies, one against the drawer, and the other against the acceptor. *Molloy*, b. 2. c. 10. f. 17.

The protest should be made by some notary public; or, if there be no notary in or near the place where the bill is payable, then any inhabitant of responsibility may protest it, in presence of two witnesses, and such protest is, *prima facie*, good evidence that the bill was not accepted, or, if accepted, that

Bills of Exchange, and Promissory Notes.

that the bill was not paid, and sufficient to put the proof on the other side.

M. 31. G. 3. *Rainsford v. Mills*. It was determined, before *Ld. Kenyon*, that a bill of exchange is not to be protested till *the day after it is due*.

Yet, regardless of this decision, and relying on the custom of merchants, bankers continue to protest the bill in the evening of the day it becomes due, contending that no power less than an act of the legislature can set it aside.

Three
days
grace on
promissory
notes,
as well as
bills.

Merchants having time out of mind established a custom of allowing three days after a bill becomes due, for the payment, which is called three days grace; and, in conformity to this rule, whatever time or date a bill is drawn at, other than on demand, it is entitled to the further extension of the three days grace. It was for a long time doubtful whether notes of hand were intitled, or not, to the same indulgence, and in the general opinion it was understood to the contrary; but, in the case of *Brown v. Harraden*, it was decided by *Ld. Kenyon*, that, as the statute of *Queen Anne* was passed for the express purpose of putting notes of hand upon the same footing with bills of exchange, there could be no doubt but they were alike intitled to the three days grace.

Necessity
of protesting
foreign
bills.

Protests are absolutely necessary, particularly on foreign bills of exchange, to entitle the party to recover against the drawer, not only interest and costs, but also the principal sum; and for this purpose the bill must be presented for payment when due, and in case of refusal of payment, or in case the drawee cannot be found, it must *then* be protested, (or, according to the decision in the case of *Rainsford v. Mills*, before *Ld. Kenyon*, the *next day* it must be protested) and notice of such protest for non-acceptance and non-payment given to the drawer *in a reasonable time*; which is held to mean by the first post after the protest is made; for, though the drawer is bound to the party to whom the bill is payable, till
payment

payment be actually made, yet it is with this condition and proviso that protest shall be made in due time, and a lawful and ingenuous diligence used for the obtaining payment of the money; and the reason hereof is, that the drawer might have had effects or other means of his upon whom he drew, to reimburse himself the bill, which since, for want of timely notice, he hath remitted or lost, it were unreasonable the drawer should suffer through his neglect. 3 *New Abr.* 613.

With regard to inland bills, though a protest was not necessary at common law in order to sue the drawer, and is only now necessary by the *stat. 9 & 10 W. 3. c. 17.* and the 3 & 4 *Anne, c. 9.* to entitle the party to interest and costs; yet convenient notice must be given by the party to whom the bill is payable, to the drawer, of the drawee's refusal of payment, and, if any damage accrue to the drawer for want of such notice, it must be borne by the person to whom the bill is payable; but a jury are to determine herein according to the custom of merchants. 3 *New Abr.* 613.

Protest-
ing inland
bills.

Promissory Notes.

By the 3 & 4 of *Anne, c. 9.* it was enacted, that promissory notes, payable to order or bearer, may be assigned or endorsed, and action maintained thereon; as on inland bills of exchange.

Promi-
ssory
notes
may be
assigned.

A note written by the plaintiff, and subscribed by the defendant, is a note made and signed by the defendant within this act; for the signing or subscribing is the lien, and the writing or making is only the mechanical part of it. *T. 6. Ann. Ash v. Baron.*

In actions on promissory notes, brought by an endorsee against an endorser, the plaintiff must prove a demand of, or due diligence to get the money from the maker of the note. 2 *Burr.* 669.

H. 19 G. 2. Vaughan v. Fuller. In an action brought

brought on a promissory note by the endorsee against an endorser, it was proved that the defendant had paid part of the money. And *Lee*, Chief Justice, held that sufficient, to dispense with the proving a demand on the maker of the note. *Str.* 1246.

Note for
money
lost at
gaming
void.

By the 9 *Anne*, c. 14, every promissory note, where the whole or any part of the consideration is money knowingly lent for gaming, is void to all intents and purposes whatever.

If bills or notes, inclosed in a letter and sent to the general post-office, are lost, no action lies against the post-master.

Notes
payable
to bearer.

Notes payable to *J. S.* or bearer, are negotiable, *per* 3 & 4 *Anne*, c. 9. Also, though an assignment of a bill, payable to *J. S.* or bearer, be no good assignment to charge the drawer with an action on the bill, yet it is a good bill between the endorser and endorsee, and the endorser is liable to an action for the money; for the endorsement is in nature of a new bill. 1 *Salk.* 125, 133. *Skin.* 343, 411.

A promi-
ssory note
requires
no pro-
testing.

A promissory note requires no protesting, though it may be endorsed over by a variety of people; for as there is no drawee, there can be no protest either for non-acceptance or for non-payment. The law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing; and therefore, in cases of non-payment, the endorser, or person holding the note, has his remedy against the drawer at any distance of time within six years, even though he should forget to give advice of its having been refused payment. — This is an advantage which always arises to the holder of a promissory note, which does not extend to the holder of a draft.

Stealing of bills of exchange, notes, &c. is felony, in the same degree as if the offender had robbed the owner of so much money, &c. And the forging of bills of exchange, or promissory notes, endorsements, &c. is felony by 2 *G. 2*, c. 25. 9 *G. 2*, c. 18, 31. *G. 2*,

31 G. 2. c. 22, and 7 G. 2, c. 22, forging the acceptance of a bill of exchange is felony without benefit of clergy.

On negotiable bills and notes made within this Kingdom, the money payable must amount to at least *twenty shillings*, and, unless under certain regulations, *five pounds*, otherwise they will be void, and the person issuing or negotiating them liable to a penalty, not exceeding twenty pounds, nor less than five. These regulations are, that they must specify the name and place of abode of the person to whom they are made payable; that they be attested by one subscribing witness; that they bear date at or before the time when they are issued; and be made payable within *twenty-one days* after the date. 27 G 3. c. 16.

Upon bills and notes for the payment of less than five pounds, the endorsement must be attested by one subscribing witness; and must mention the name and place of abode of the endorsee, and bear date at or before the time of making it. An endorsement which mentions the name of the person in whose favour it is made, is called a *full* endorsement; an endorsement which does not, a *blank* one. A blank endorsement makes a bill or note payable to the bearer. A full endorsement restrains the negotiability of the bill or note, until it has passed the hands of the endorsee, or person he pays it to. Therefore, in case of a loss by theft or accident, if the bill or note be transferrable by mere delivery or *blank* endorsement, the thief or finder may transfer it; if by a *full* endorsement only, he cannot. Thus, an endorsement in these words, "Pay the contents to J. S. only;" or, "to J. S. for my use;" is restrictive; as is also an endorsement to an infant.

By the 31 G. 3. c. 25. The former duties on these instruments, which were, by 23 G. 3. c. 49, 3*d.* if under 10*l.*—6*d.* if under 50*l.*—and 1*s.* if of 50*l.* or upwards, are repealed.

And this act (31 G. 3. c. 25) enacts that from and after Aug. 1, 1791, there shall be paid the new duties following, viz.

R

For

Bills of Exchange, and Promissory Notes.

For every piece of vellum, parchment, or paper, upon which any bill of exchange, draft, or order for the payment of money on demand, shall be written, &c. where the sum amounts to 40s. and does not exceed 5*l.* 5*s.*—a stamp duty of three pence.

Above 5*l.* 5*s.* and not exceeding 30*l.*—sixpence.

Above 30*l.* and not exceeding 50*l.*—nine pence.

Above 50*l.* and not exceeding 100*l.*—one shilling.

Above 100*l.* and not exceeding 200*l.*—one shilling and sixpence.

For every promissory, or other note, for payment of money to the bearer on demand, which may be re-issuable, after payment, at the place where the same was first issued, where the sum amounts to 40s. and does not exceed 5*l.* 5*s.*—a stamp duty of three pence.

Above 5*l.* 5*s.* and not exceeding 30*l.*—sixpence.

Above 30*l.* and not exceeding 50*l.*—nine pence.

Above 50*l.* and not exceeding 100*l.*—one shilling.

Above 100*l.* and not exceeding 200*l.*—one shilling and sixpence.

Where these promissory notes shall be paid by the person by whom the same shall have been made or signed, and first issued, and at the place where the same were first issued, the person so paying the same, notwithstanding such payment, may at any time afterwards, and so often as there shall be occasion after every such payment thereof, but not otherwise, again issue and negotiate such notes; and every such note is declared to be after payment, but not otherwise, issuable and negotiable. But if such notes shall be paid by any other than the person making or signing the same, or at any place other than the place of issuing, such note shall be construed to be vacated and satisfied, and shall be no longer negotiable but cancelled; and if any person shall again issue any such note after payment by any person other than the person making the same, or at any place other than the place of issuing, or if any person named in such note for payment thereof, shall
after

after payment neglect or refuse to cancel the same, such person shall forfeit 20*l*. And if such note shall not be cancelled, then, and as often as it shall be again issued, there shall be due, answered, and paid the like duty as was first charged on such note, to be payable by and charged on the person who shall again issue and negotiate such note. *s. 7.*

For any promissory or other note, payable to the bearer on demand, which may be re-issued, after payment at the same, or any other place than where first issued, where the sum shall amount to 40*s*. and not exceed 5*l*. 5*s*. a stamp duty of sixpence. Above 5*l*. 5*s*. and not exceeding 30*l*. one shilling.

It is declared that these notes may, as often as occasion shall require, be again issued by the person making the same, notwithstanding such notes have been paid by the person making the same, or any other person in pursuance of any appointment for the payment thereof.

For every bill of exchange, draft, or order, payable otherwise than on demand, or any promissory or other note payable otherwise than to the bearer on demand, where the sum shall amount to 40*s*. and not exceed 30*l*. a stamp duty of sixpence.

Above 30*l*. and not exceeding 50*l*.—nine pence.

Above 50*l*. and not exceeding 100*l*.—one shilling.

Above 100*l*. and not exceeding 200*l*.—one shilling and sixpence.

And for every bill of exchange, promissory, or other note, draft, or order, payable on demand or otherwise, where the sum shall exceed 200*l*. there shall be charged a stamp duty of two shillings.

Which duties shall be paid by the person making or signing such bills, &c.

Foreign bills of exchange drawn in sets, according to the custom of merchants, where the sum shall not exceed 100*l*. shall be charged with a stamp duty of sixpence—exceeding 100*l*. and not 200*l*. nine pence—and exceeding 200*l*. one shilling.—And

Bills of Exchange, and Promissory Notes.

every bill of each set so drawn is declared to be chargeable with the duty.

Exemptions from the foregoing Duties.

1. Drafts or orders, payable to bearer on demand, bearing date on or before the day on which the same shall be issued, and at the place from which the same shall be drawn and issued, and drawn upon any banker, or person acting as a banker and residing and transacting business as a banker, within ten miles of the place where such draft or order shall be actually drawn and issued.

2. All notes and bills whatever issued by the bank of *England*, upon condition of their paying into the Exchequer the annual sum of 12,000*l.* half yearly, on Oct. 10, and April 5.

New Regulations, 31 G. 3. c. 25.

If any bill, &c. shall be written on paper not stamped, or stamped with a stamp of lower value than directed; then there shall be due and paid the full duty hereby chargeable; which shall be payable by and charged upon all persons who shall draw or make, and utter and negotiate such bill, &c. *s.* 6. And all persons who shall write or sign, or cause to be written or signed, or who shall accept or pay, or cause to be accepted or paid, any bill, &c. without being first stamped with a proper stamp, or upon which there shall not be some stamp resembling the same, shall forfeit 20*l.* *s.* 10.

Every promissory or other note, payable to the bearer on demand, which shall be issued after payment under this act, shall notwithstanding be payable to the person holding the same; and such person may maintain an action thereupon. *s.* 9.

The 19th section declares, that no bill, &c. shall be

be available in law or equity, unless stamped with the lawful stamp; and that it shall not be lawful for the commissioners to stamp any paper, &c. after any bill, &c. shall be written thereon, under any pretence whatever.

But in an indictment for forging a bill of exchange, the bill may be given in evidence, though it is not stamped pursuant to the statutes: as in the case of *K. v. Hawkeswood*.

Forged
bill of ex-
change
unstamped.

At *Worcester Lent Assize*, 1783, the prisoner was indicted for forging a negotiable bill of exchange, purporting to be drawn by one *Prattington* on Sir *Robert Herries & Co.* And also for forging two endorsements on the same; the one in the firm of *Cox and Dery*, the other in the name of *John Hadur*. There were also the usual counts for uttering it, knowing it to be forged. The fact of its being a forgery, and that the prisoner had negociated it with a complete knowledge of the fact, were very clearly proved, but the bill was not stamped. *Mr. Baldwin*, the prisoner's counsel, submitted to the court, that the instrument in question, even supposing it to be genuine, was not a lawful bill of exchange, but a piece of waste paper, incapable of becoming the subject either of a fraud or felony; that the party who took it, must at that time have known that it was not a legal bill of exchange, or he must have been grossly negligent, for the defect is visible on the face of it. — *Mr. Justice Buller*, who tried the prisoner, held, that the stamp acts being revenue laws, and not purporting to alter the crime of forgery, could not affect the present question, and the jury found the prisoner guilty: but, being a new point, he respited the judgment, and reserved the case for the consideration of the judges. — In *Easter Term*, 1783, the judges over ruled the objection, and determined that the conviction was right. *Leach's Cas.* in *Cr. Law*, 221.

Carriers.

Carriers.

Carriers
to be an-
swerable
for goods.

Losing
goods.

THERE is always an implied contract in law, on the part of every carrier or barge-master, to be answerable for the goods he carries, unless the goods are consumed or damaged by the act of God, as by lightning, a sudden gust of wind, &c. 1 *Str.* 128. 3 *Blackst. Com.* 165.

If a man delivers goods to a common carrier, to carry to a certain place; if he loses them, an action upon the case lies against him; for, by the custom of the realm, he ought to carry them safely. 1 *Bac. Abr.* 343.

And if he be a common carrier, though there be no agreement or rate settled, or promise of payment, yet he may recover his hire on a *quantum meruit*, and therefore shall be liable for loss and damages. *Id.*

Also if a person, who is not a common carrier, takes upon himself to carry my goods, though I promise him no reward, yet if my goods are *lost* or *damaged* by his default, I shall have an action against him. *Id.*

For the very taking of the goods is a general consideration, though the person be not a common carrier; and the acceptance of the goods makes him liable. *Show.* 104.

If a man delivers goods to a common hoyman, who is a common carrier of goods, to carry them to a certain place, and pays him according to the custom for the carriage of them; and after, for default of keeping, they are *lost*, an action upon the case lies against him; for, by the common custom of the realm, he ought to have kept and carried them safely. *Cro. Jac.* 330. *Hob.* 17.

Carrier
not ac-
counta-
ble for
loss occa-
sioned by
the act
of God.

But, though the common carrier is, in general, accountable for the *loss* or *damage* of goods delivered to him as a common carrier, yet there are particular exceptions. As in the case of *Amies v. Stephens*, *M.* 5 G. The plaintiff put goods on board the hoy
of

of the defendant, who was a common carrier; coming through bridge, by a *sudden gust of wind* the hoy sunk, and the goods were spoiled. The plaintiff insisted that the defendant should be liable, it being his carelessness in going through at such a time; and offered some evidence, that if the hoy had been in good order, it would not have sunk with the shock it received; and from thence inferred the defendant answerable for all accidents, which would not have happened to the goods in case they had been put into a better hoy. But the chief justice held the defendant not answerable, the damage being occasioned by the act of God. For, though the defendant ought not to have ventured to shoot the bridge, if the general bent of the weather had been tempestuous; yet this being only a sudden gust of wind, had intirely differed the case: and no carrier is obliged to have a new carriage for every journey; it is sufficient if he provides one, which, without any extraordinary accident (such as this was) will probably go the journey. *Str.* 128.

A. with several others, takes a passage in a ferry-boat, and, while they are on the water, a tempest arises, so that they are in danger of being drowned; upon which, to preserve their lives, several articles were thrown overboard, and, among them, a pack of goods of great value, belonging to *A.*—In this case, *A.* shall have no action against the bargeman. *2 Bulst.* 280.

M. 11 G. 3. Davis and James. On an action against who a common carrier, for goods *lost*, the question was, shall have his action in whose name the action ought to have been brought? The declaration charged that the plaintiff being possessed of cloth, as of his own proper goods, delivered the same to the defendant to be carried to *London*, and delivered to a certain person there. The goods were lost, and the plaintiff obtained a verdict against the carrier. It was moved for a new trial, on the objection, that the action ought to have been brought in the name of the person to whom the goods were consigned, and not in the

the name of the consignor, the consignor having parted with his property upon his delivering the goods to the carrier, and no property remained in him after the delivery. It was answered, that the question did not turn upon the strict property: the carrier has nothing to do with the vesting of the property. It does not lie in his mouth to say, that the consignor is not the owner. He is the owner with respect to the carrier, who undertook to him, and was to be paid by him. Lord *Mansfield* said there was neither law nor conscience in the objection. The vesting of the property may differ, according to the circumstances of cases; but it does not enter into the present question. This is no action upon the agreement between the plaintiff and the carrier. The plaintiff was to pay him; therefore the action is properly brought by the plaintiff, who agreed with him, and was to pay him. *Burr. Mansf.* 2680.

Carrier
account-
able if
robbed.

It is clearly resolved that, if a carrier be *robbed*, he shall answer the value of the goods; for he has his hire, which implies an undertaking for the safe custody and delivery of them, which charges him at all events: and this political institution was introduced the better to secure people in their dealings, and to prevent carriers, who are often intrusted with things of the greatest value, from confederating with robbers, &c. *Co. Litt.* 89. 1 *Salk.* 143.

But only
for such a
sum of
money as
he re-
ceives a
confide-
ration
for.

But if a common carrier receives by his book-keeper, from another person's servant, two bags of money sealed up, containing, as he was told, 200*l.* and the book-keeper gives a receipt for his master to the following effect: "Received of *A. B.* two bags of money, sealed up, said to contain 200*l.* which I promise to deliver on such a day at such a place to such a person, he to pay 10*s.* per cent. for carriage and risque;" though the bags contain 400*l.* and the carrier is *robbed*, he shall be answerable for only 200*l.* for this is a particular undertaking; and as it is by reason of the reward that the carrier is liable, if the plaintiff endeavours to defraud

defraud him of it, it is but reasonable that he should be barred of the remedy, which is only founded on the reward. 1 *Bac. Abr.* 346.

A carrier is not accountable for cash, or other valuable articles, unless delivered to him as such, and paid for at an advanced rate; as in the case of *Gibbon and Payton*, *E. 9 G. 3.* The *Birmingham* coachman had inserted an advertisement in a *Birmingham* news-paper, with a *nota bene*, that he would not be answerable for money, or jewels, or other valuable goods, unless he had notice that it was money, or jewels, or valuable goods, that was delivered to him to be carried. It was also notorious in that country, that the price of carrying money from *Birmingham* to *London* was three-pence in the pound. The sum of 100*l.* was delivered to the coachman, as a common carrier, packed up with some hay in an old nail-bag, and it was concealed from him that such bag contained any money. The bag and the hay arrived safe, but the money was gone. The court were of opinion that a common carrier ought not to be answerable where he is deceived. The true principle of a carrier's being answerable is the reward: a higher price ought in conscience to be paid him for the insurance of money and other valuable things, than for insuring common goods of little value. He may make a special contract, or he may refuse to contract, in extraordinary cases, but on extraordinary terms. *Burr. Mansf.* 2298.

And in the case of *Burton v. Bolton*, *E. 32. G. 3.* a similar judgment was given. This was an action to recover from the defendant, as the proprietor of a *Chester* coach, thirteen pounds thirteen shillings, the value of several articles of wearing apparel which were lost in their carriage to *Chester*. Mr. *Mingay*, counsel for the plaintiff, said his client was a gentleman's servant; the defendant was the master of the *Golden-Cross* inn at *Charing-Cross*. The question, and that for the decision of the jury would be, "Whether the plaintiff, when the trunk was delivered, knew, or had the means of knowing, that

the defendant would not be responsible for any greater loss than 5*l.* without an extra payment." A witness proved the delivery of the trunk at the inn.—Mr. *Erskine*, counsel for the defendant, said his client had caused hand-bills to be distributed, advertisements in the news-papers to be inserted, and affixed a board in his warehouse, announcing that he would not be responsible for more than 5*l.* unless the value of the property was specified upon delivery, and paid for accordingly.—Mr. *Mingay*, for the plaintiff, replied, that his poor client knew nothing about these advertisements, and he should prove that the board at the warehouse, which contained this information, was not legible. An attorney's clerk said, he had been at the defendant's warehouse more than ten times and had never seen this board till after the present action was brought. The board was placed in a dark part of the warehouse, and it was with difficulty it could be read.—Lord *Kenyon*, in his address to the jury, said, he only spoke the same language which his predecessors had done when he declared that it was notorious to the world that stage-coaches and waggons made exceptions as to their responsibility for losses, when the goods amounted to a certain value. This was a thing so settled by the common consent of mankind, that it would be the most dangerous thing in the world to alter it. If it were to be held that stage-coaches and waggons were answerable for valuable things, unless they were paid for as such, and thereby a superior degree of attention excited, it would deprive the public of all the advantages that were derived from these conveyances. A man might send a service of plate, worth many thousand pounds, by one of these coaches, and book it as a common parcel; if it was lost, and the proprietor of the coach was liable, it might ruin him. An instance of this sort had actually happened: a nobleman sent plate to the value of 2000*l.* by one of those conveyances, which was taken out, but was not paid for. When a parcel was paid for as containing

containing valuable articles, the proprietor of the coach, and his servants were put upon their guard; and if they did not bestow a superior degree of attention, they were inexcusable; and if the goods by their negligence were lost, it would be no hardship to compel them to pay.—The jury found a verdict for the defendant, and recommended it to him to put a board in the most conspicuous part of his warehouse, so that no person who came there could help seeing it. *MS.*

If a carrier has goods *stolen* from him, he may prefer an indictment against the felon, as for his own goods; for, though he has not the absolute property, yet he has such a possessory property, that he may maintain an action of trespass against any one who takes them from him, and may therefore indict a thief for taking them. The indictment would also have been good, had it been brought by the real owner. *Kelynge, 39.*

Carrier may indict for goods stolen.

It is said a man may commit larceny, by stealing his own goods delivered to the carrier, with intent to make him answer for them; for the carrier had a special kind of property in the goods, in respect whereof, if a stranger had stolen them, he might have been indicted generally as having stolen the said carrier's goods; and the injury is altogether as great, and the fraud as base, where they are taken away by the very owner. *1 Haw. 94.*

A man stealing his own goods from the carrier.

Carriers are accountable in case of fire, as determined in *M. 25 G. 3: Ferward v. Pittwood.* This was a special case, reserved for the opinion of the court. The defendant was a common carrier, to whom the plaintiff had delivered a parcel of hops, to be carried by the defendant's waggon. The defendant put them into his warehouse, and, during the night, a fire broke out in the adjoining house, which communicated to, and burnt the defendant's warehouse, and with it the plaintiff's goods. The question before the court was, whether the plaintiff was entitled to recover. The case was argued by *Bond* for the plaintiff, and *Burrough* for the defend-

He is accountable in case of fire.

ant. By lord *Mansfield*: Upon all the cases for upwards of one hundred years, it is most clear that there are events in which the carrier is answerable, though not guilty of any neglect: by the nature of the contract, he obliges himself to use all due care and diligence, and is answerable for any neglect; but there is something more imposed upon him by custom, that is, by the common law. A common carrier is in the nature of an *insurer*; all the cases shew him to be so. This makes him liable to every thing except the act of God, and the king's enemies; that is, even for inevitable accidents, with those exceptions. The question then is, What is the *act of God*? I consider it to be laid down in opposition to the *act of man*; such as lightnings, storms, tempests, and the like, which could not happen by any human intervention. To prevent litigation and collusion, the law presumes negligence, except in these circumstances; an armed force, though ever so great and irresistible, does not excuse: the reason is, for fear it should give room for collusion, which can never happen with respect to the act of God; we all, therefore, are of opinion, that there should be judgment for the plaintiff. MS.

But not
account-
able for
the effects
of fire
where
the car-
rier has
com-
pleted his
business.

But not in the following case: *E. 32. G. 3. Gar-
side v. the Proprietors of the Trent and Mersey navi-
gation.* The declaration in this case stated that the
defendants were common carriers of goods, &c.
for hire, from *Stourport* to *Manchester*, and that the
plaintiff on &c. at *Stourport* delivered to the de-
fendants four pockets of hops, to be by them taken
care of, and safely and securely carried from *Stour-
port* to *Manchester*, and to be forwarded from thence
to *Stourport* for the plaintiff. That, in consideration
of the premises, and also in consideration of certain
hire and reward to be therefore paid to the defend-
ants, they undertook to take care of the said hops,
and safely and securely to carry them, and forward
the same; yet that the defendants did not forward
the said hops from *Manchester* to *Stourport*. The
second count stated the delivery of the hops to the
defendants,

defendants, to be taken care of and safely and securely carried from *Stourport* to *Manchester*, and there kept by the defendants for the plaintiff, until the same should be forwarded from *Manchester* to *Stourport*, &c. At the trial before Judge Wilson, it appeared that the goods directed to the plaintiff at *Stourport* were delivered to the defendants, to be carried by them from *Stourport* to *Manchester*; that they arrived safe at *Manchester* on the 30th of September, and were that evening put into the defendant's warehouse there, where (together with other goods) they were consumed by an accidental fire that night, and before any carrier came from *Stourport* to whom they could be delivered. It also appeared that, according to the course of business, when goods are sent from *Stourport* to go beyond *Manchester*, if any carrier to the place of their destination be at *Manchester* ready to receive them, they are immediately delivered upon payment of the carriage from *Stourport* to *Manchester*, and if not the defendants keep them in their warehouse till a carrier arrives, to whom they may be delivered on making the above payment, the defendants not charging any thing for lodging and keeping the goods in their warehouse. Some time before the goods in question were delivered to the defendants, their agents told the plaintiff, that, if he would send all his goods by them, they would forward them to *Stourport* by the first carrier that should come there, without insisting on being paid for the carriage before they delivered them, and would settle with him when they met. A verdict was taken for the defendant, with liberty to the plaintiff to move to set it aside and to enter up a verdict for him, if this court should be of opinion that the defendants were answerable under these circumstances. Bower accordingly now moved to set aside the verdict, contending that the defendants were responsible, as it was a joint contract by them to carry the goods to *Manchester*, and to keep them safe at that place till they

they could be forwarded to *Stourport*; and that it was for their convenience that the goods were deposited in their warehouse.—The court refused even a rule to shew cause.—Lord *Kenyon*, chief justice, said, if the defendants were considered merely as warehousemen, there would be no pretence to say that they were liable to such an accident as the present. The case of a carrier stands by itself, on peculiar grounds; he is held responsible, as an insurer; and the reasons given in the books (whether well or ill founded is not material here) is to prevent fraud. But I do not see how we can couple the character of the carrier with that of the warehouseman, in which last the defendants are not liable here, they not having been guilty of laches.—*Buller* Justice. The keeping of the goods in the warehouse is not for the convenience of the carrier, but of the owner of the goods; for, when the voyage to *Manchester* is performed, it is the interest of the carrier to get rid of them directly; and it was only because there was no person ready at *Manchester* to receive these goods, that the defendant was obliged to keep them. *Durnf. and East. iv. 581.*

A rule was afterwards obtained to shew cause why a new trial should not be granted, when the court in Michaelmas Term 1793, were unanimously of opinion that the plaintiffs were entitled to retain their verdict.

If a box is delivered generally to a carrier, and he accepts it, he is answerable, though the party did not tell him there is money in it. But if the carrier asks, and the other says no, or if he accepts it conditionally, provided there is no money in it, in either of these cases, the carrier is not liable. *Str. 145.*

Carrier opening a pack may be guilty of felony.

It has been resolved, that if a carrier should open a pack, and take out some of the goods with intent to steal them, he may be guilty of felony; in which case it may be said, not only that such possession of a part, distinct from the whole; was gained by wrong, and not delivered by the owner; but also that

that it was obtained basely, fraudulently, and clandestinely, in hopes of preventing its being discovered, or fixed upon any one when discovered.—

1 *Haw.* 90.

It has also been resolved, that, if goods are delivered to a carrier to be carried to a certain place, and he carries them to another place and disposes of them to his own use, this is felony; because it appears that his intention originally was not to take the goods upon the agreement and contract of the party, but only with a design of stealing them. *Kelynge* 82.

Taking
goods to
another
place,

And it seems clear that if a carrier, after carrying the goods to the place appointed, takes them away secretly, with intent to steal them, he is guilty of felony; for, as the possession which he received from the owner is determined, his second taking is in all respects the same as if he were a mere stranger.

or after
carrying
them to
the place
appointed,

1 *Haw.* 90.

But if it has been held, that if a carrier embezzles goods which he has received to carry to a certain place, he is not guilty of felony, because the goods were intrusted to him, and there was not a *felonious taking*; he is liable only to a civil action. 1 *Haw.* 89, 90.

A carrier shall not evade the law, by refusing to carry goods at the prices limited: for if a common carrier, who is offered his hire, and has convenience, refuses to carry goods, he is liable to an action, in the same manner as an innkeeper who refuses to entertain a guest, or a smith who refuses to shoe a horse. 1 *Bac. Abr.* 344.

Carrier
liable to
an action
for re-
fusing to
carry
goods.

An action will also lie against a common ferryman, who refuses to carry passengers. *Id.*

But if the porter puts up the box of a passenger behind a stage-coach, and the master, as soon as he knows of it, says, he is already full, and refuses to take the charge of it, the master shall not be liable. For his situation is similar to that of an host who refuses his guest, his house being full, and yet the party

But not
if he is
full.

party says he will shift, or the like, if he should be robbed, the host is discharged. *Id.*

A carrier may also refuse to admit goods into his warehouse at an unseasonable time, or before he is ready to take his journey; but he cannot refuse to do the duty incumbent upon him by virtue of his public employment. *L. Raym. 652.*

Goods
delivered
to his
servant.

A delivery of goods to the carrier's servant, is a delivery to the carrier; and if they are delivered to a carrier's porter, and lost, an action will lie against the carrier. *Read. Car.*

Carrier
may
detain
goods.

A carrier may refuse to deliver goods without being paid his hire, as determined in the case of *Skinner and Upshaw. E. 1 Ann. L. Raym. 752.*

And if the goods are stolen, the right owner shall not have them without paying for the carriage: for, as the carrier is obliged to receive and carry them, the law will not deprive him of the remedy for the reward due for the carriage.

This point was determined in the case of *York v. Greenaugh*. It was an action of *replevin*. *Holt*, chief justice, cited the case of the *Exeter* carrier, where *A.* stole goods and delivered them to the carrier, to be carried to *Exeter*: the right owner finding the goods in possession of the carrier, demanded them of him, on which the carrier refused to deliver them, without being paid for the carriage. The owner brought an action of *trover*, and it was held he might justify the detaining against the right owner for the carriage; for when *A.* brought them to him, he was obliged to receive and carry them; and therefore since the law compelled him to carry them, it will give him a remedy for the premium due for the carriage. *L. Raym. 866.*

Penalty
for tra-
velling on
Sundays.

By the 3 *C. c. 1.* No carrier with any horse or horses, nor waggon-man, carman, or wain-man, with their respective carriages, shall by themselves or any other, travel on the Lord's Day, on pain of 20s. on conviction in six months, before one justice, or mayor, on view, confession, or oath of two witnesses

nesses, to be levied by the constables or church-wardens by distress, to the use of the poor; but the justice may reward the informer with any sum not exceeding a third part.

Debtor and Creditor.

IF a debtor owes money to a creditor on several accounts, he may pay part and apply it to any debt; but if he pays it indefinitely, the creditor has his election to declare on what account he received it. *8 Mod. Rep. 236.*

Debts paid on several accounts.

Deeds of gift, grants, &c. made with intent to defeat creditors of their just debts, are void as against such creditors. And gifts made in secret are liable to suspicion of fraud. *13 Eliz. c. 5. 3 Rep. 80.*

Fraudulent deeds void against creditors.

Stoppage and setting off of mutual debts is equivalent to actual payment, and a balance shall be struck as in equity and justice it ought to be. *2 Burr. 820.*

Setting off debts.

By the custom of *London*, a man may attach money of goods belonging to his debtor in the hands of a stranger. *12 Mod. Rep. 213.* But trust-money is not within the custom.

Goods and money attached.

If none of the kindred will take out administration, a creditor may do it. *1 Salk. 38.*

Among debts of equal degree, the executor or administrator is allowed to pay himself first. *1 Roll. Abr. 922. Plowd. 543.*

By the custom of *London*, the debtor may be arrested before the money is due, to make him find sureties. *8 Rep. 126.*

Money not due.

When a woman indebted takes a husband, it is then the debt of the husband and wife, and both are to be sued for it; but after the death of the wife, the husband is not liable, unless judgment

Wife indebted before marriage.

ment is obtained against them both during marriage, or it is rent in arrear. *Pract. Reg.* 105.

If a *feme sole* indebted marries and dies, the husband shall not be charged, for they must be recovered in the life-time of the wife. *1 Roll. Abr.* 351.

Husband
not liable
to a wife's
debts
after her
death.

In Chancery. *Heard and Stamford.* The husband, as such, is not chargeable in a court of equity, any more than at law, with the debts of his wife after her decease, not even though he had a large fortune with her: but during the coverture, he is liable to all her debts, though he had no fortune with her. *Caf. Talb.* 173. *3 Peere Will.* 409.

Necessary
apparel.

If a married woman buys things for her necessary apparel, diet, &c. without her husband's consent, he must pay it. *1 Siderf.* 120. *Allyn* 61.

Forbid-
ding cre-
dit.

Yet if he forbids particular persons to trust his wife, he shall not be charged after such prohibition. *1 Vent.* 42.

H. 2 Ann. Etherington v. Parrot. On a trial before *Holt*, chief justice, at *Guildhall*, in an action on the case for goods sold and delivered, the evidence to charge the defendant was, that the goods were taken up by the defendant's wife to make her cloaths, and that they cohabited together; but on the defendant's side it was given in evidence, that his wife was an extravagant woman, and used to pawn her cloaths for money to buy drink, and get drunk: that she pawned a suit of cloaths, which cost 7*l.* for 1*l.* 8*s.* and when her husband redeemed them, pawned them again; that at the time of buying these, she had very good cloaths; that she had bought cloaths here before, and her husband had paid for them; but when he paid for them, he gave notice to the plaintiff's servant, who received the money, that his master should trust her no more; which he promised not to do. By *Holt*, chief justice: If a husband turns away his wife, he gives her credit wherever she goes, and must pay for necessaries for her; but if she runs away from him, he shall not be liable to any of her contracts, for it is the cohabitation that is

an evidence of the husband's assent to contracts made by his wife for necessaries : but if the husband has solemnly declared his dissent that she shall not be trusted, any person that has notice of this dissent, trusts her at his peril after; for the husband is only liable on account of his own assent to the contracts of his wife; of which assent cohabitation causes a presumption; for the wife has no power originally to charge her husband, but is absolutely under his power and government, and must be content with what he provides; and if he does not provide necessaries, her remedy is in the Spiritual Court. But here were sufficient necessaries provided, and also the husband had forbid the plaintiff to trust her; and notice to the plaintiff's servant usually employed by him in his trade, was a good notice to his master, and therefore he cannot charge the defendant. On which the plaintiff was non-suited. It was also observed by the chief justice, that if a wife takes up silks and pawns them before they are made into cloaths, the husband shall not be liable for the silks, because they never came to his use: but otherwise, if they were made into cloaths, and then pawned by her.—

2 Raym. 1006.

But a prohibition in general not to trust a wife, as by putting her into the gazette, &c. cannot amount to legal notice. *Wood's Inst.* 60. A general prohibition.

Where a wife absents herself from her husband, they that trust her after her departure is notorious, do it at their peril, and shall not therefore charge the husband. Otherwise it is, if the husband turns her off. *1 Salk.* 118. *1 Lev.* 5. When the departure is notorious.

An action lies against the husband for goods delivered to his wife, if she usually bought goods, and her husband paid for them; or if it can be intended that the goods came to the husband's use. *1 Lev.* 4, 5. Goods delivered to a wife.

2 Lev. 16.

The necessary apparel of the wife, upon the cease of the husband, is protected against the claim of creditors. *Wood's Inst.* 63. Necessary apparel.

Wife living apart.

A wife living apart from her husband with a separate maintenance by deed, may be sued for debt as an unmarried woman may. 1 *Black. Com.* 434.

Sole trader.

A wife who is a sole trader, may be sued in London, by the custom of the city, without the husband. *Cro. Car.* 69.

Factor.

Employing a factor.

IF a man make another his factor to buy goods for him, the employer shall be charged by his contract, though the goods come not to his possession. *Noy's Maxims*, 17.

Concerning ready money, &c.

A factor, of common right, is to sell for ready money; but if he be a factor in a sort of dealing or trade, where the usage is for factors to sell on credit: there, if he sells to a person of good credit at that time, and he afterwards becomes insolvent, the factor is discharged. Otherwise it is, if he sell to a man notoriously discredited at the time of the sale. 12 *Mod. Rep.* 514.

Factor taking the risk on himself.

If a factor upon the sale of goods takes the risque of the purchaser's solvency upon himself, his principal may, though the goods were sold in the factor's name, maintain an action against the purchaser, if notice had been given of the property before payment made to the factor.

Factor pledging goods.

Though a factor is empowered to sell, and thereby to bind his principal, he cannot bind nor affect the property of the goods, by pledging them as a security for his own debt, though there is the formality of a bill of parcels and a receipt. 2 *Str.* 1178.

Where

Where a merchant consigns goods to a factor in London, the factor can have no property in such goods, neither will they be affected by a bankruptcy. 3 P. Wms. 186.

If goods are consigned to a factor, and upon arrival he makes a false entry at the Custom-house, or lands them without paying the customs, whereby they become forfeited, and are seized, whatever the principal hereby suffers, the factor must inevitably make good, although his commission were general; but if the factor makes his entry according to the invoice, or his letter of advice, and it falls out the same are mistaken, though the goods are lost, yet is the factor excused. Molloy 423. Cro. Jac. 265. Lan. 65.

If a factor or such like accountant, be robbed, without his default or negligence, he shall be discharged thereof upon his account, unless there is a special agreement to the contrary. Co. Litt. 89.

Factor
being
robbed.

A factor to whom a balance is due, has a lien upon all goods of his principal, while they remain in his possession. 1 Burr. 494.

The bare circumstance of being the factor, does not incapacitate a man from being evidence in a cause.—It is otherwise if he be interested. 11 Mod. Rep. 226.

Insurance.

Insurance.

INSURANCE, or Assurance, signifies a security given, in consideration of a sum of money paid in hand of so much *per cent.* to an assurer or insurer, to indemnify the insured from such losses as shall be specified in the policy or instrument of assurance, subscribed by the insurer or insurers for that purpose.

By the 14 G. 3. c. 48. No assurance can legally be made on lives, or on any other event, wherein the party insured has *no interest*.

And by the same statute, the name of the party interested, must be inserted, and nothing more shall be recovered thereon, than the amount of the interest of the insured, except in marine inferences.

In contracts for insurance, the parties ought to know all the circumstances. 2 Str. 1183.

In insurances, the strict letter of the contract is not so much to be regarded as the object and intention of it. 3 Burr. 1237.

Warranties to be strictly complied with.

Warranties in policies must be strictly complied with; but representations need only be fair, and substantially true. Cowp. 785.

A stipulation, though written on the margin of the policy, is a warranty, as much as if written on the body of the instrument. 1 Doug. 11.

But if on a separate paper, though pinned or wafered to the policy, it is only a representation.— 1 Doug. 13.

Where the insured represents material facts, not knowing them to be true, he takes the risk of their being so on himself. 1 Doug. 261.

A representation made to the first underwriter extends to all others. 1 Doug. 305.

An underwriter is presumed to understand.

An underwriter is presumed to know the nature and peculiar circumstances of the branch of trade to which the insurance relates. 1 Doug. 510.

Damages

Damages happening to perishable goods from their own nature, are not to be borne by the insurer. Perishable goods.

By the 19 G. 2, c. 37, all insurances, interest, or no interest, or without farther proof of interest than the policy itself, or by way of gaming and wagering, or without benefit of salvage to the insurer, are null and void; except upon privateers, or upon ships or merchandize from the *Spanish* or *Portuguese* dominions. Insurances by way of gaming and wagering.

It shall not be lawful to make re-assurance, unless the assurer be insolvent, become bankrupt, or die; in either of which cases such assurer, his executors, administrators or assigns, may make re-assurance, to the amount of the sum before by him assured; provided it be expressed in the policy to be a re-assurance. 19 G. 2, c. 37. Re-assurance.

An insurance being made without interest, and the premium paid, the insured shall not recover it back. 1 Doug. 468.

By the 19 G. 2. c. 37 it is enacted, that every sum lent on *bottomry*, or at *respondentia*, upon any subjects ships to or from the *East Indies*, shall be lent only on the ship, or the merchandizes laden on board her, and so expressed in the condition of the bond; and the benefit of *salvage* shall be allowed to the lender, his agents, &c. who alone shall have a right to make assurance on the money lent: and no borrower of money upon *bottomry*, or at *respondentia* as aforesaid, shall recover more on any assurance than the value of his interest on the ship or effects, exclusive of the money borrowed. And if the value of his interest doth not amount to the money borrowed, he shall be responsible to the lender for the surplus, with lawful interest for the same, together with the assurance and all charges, &c. notwithstanding the ship and merchandize be totally lost.

Where a ship is seized and condemned by process of law, the property and ownership are destroyed, and there is no remedy on the policy of insurance.

1 Ld. Raym. 724.

If

Owners
may
change
the cap-
tain.

Goods
sent on
shore.

Depart-
ing with
convoy.

Proceed-
ing to the
place of
rendez-
vous to
find a
convoy.

If a ship is insured under captain *A. B.* the owners may change the captain without notice to the insurers. 12 *Mod Rep.* 325.

Goods sent on shore by the ship's boat, are considered as part of the ship and voyage, and the insurer is liable for their safety. Otherwise it is, if they are delivered from the ship into a boat or vessel by order of the owner. 2 *Str.* 1236.

A ship warranted to depart with convoy, it is to be considered as under insurance to the place of general rendezvous; and if the parties mean to vary the insurance from what is generally understood, they should particularize her departure with convoy, from some specific place. 2 *Str.* 1251. 1265.

On a warranty to sail from *Jamaica* on or before a day certain, if the ship departs from her port of loading on that day, with all her cargo and clearance on board, and proceeds to the place of rendezvous in the island expecting to find a convoy and proceed immediately, but is detained there by an embargo till after the day, the departure is a compliance with the warranty, though the captain knew of the embargo when he sailed, the embargo being only till convoy shall be ready. 1 *Doug.* 357.

On an insurance from *London* to *Gibraltar*, warranted to depart with convoy, it appeared there was a convoy appointed for that trade at *Spithead*, and the ship *Ranger* having tried for convoy in the *Downs*, proceeded for *Spithead*, and was taken in her way thither. The insurers insisted that this being the time of a *French* war, the ship should not have ventured through the channel, but have waited in the *Downs* for an occasional convoy. And many merchants and office-keepers were examined to that purpose. But the Chief Justice held that the ship was to be considered as under the defendant's insurance to a place of general rendezvous, according to the interpretation of the words warranted to depart with convoy. *Salk.* 443, 445. And if the parties meant to vary the insurance from what is commonly understood,

understood, they should have particularized her departure with convoy from the *Downs*. The juries were composed of merchants, and in both cases found for the plaintiffs upon the strength of this direction. *Str.* 1265. 2 G. 2. *Gordon v. Morely*, and *Cambel v. Bordieu*.

If a ship is insured at and from *Jamaica* warranted to sail or to have sailed, on or before a day certain, if she sail on that day, from her port of loading with all her cargo and clearances on board, to another part of the island for the sake of joining convoy, that being the usual place of rendezvous, the warranty is complied with, although such place be out of the direct course of the voyage, and the ship is detained there, by an embargo, till after the day. *Cowp.* 601.

Yet the ship in such case would be protected under the words "at *Jamaica*" in sailing between the two places. *Id.*

If a ship warranted to sail on a day certain, gets under sail on the day, with intent to pursue her voyage, the warranty is complied with, though she should be obliged to put back instantly by a storm, an embargo, or an enemy, before she gets out of the harbour. *Id.*

The words *warranted to depart with convoy* have been resolved to import, by the usage of merchants, a continuance with that convoy as long as may be. *Luc. Rep.* 287.

In the case of *Victorin v. Cleeve*, the plaintiff insured on goods in the *John and Jane* from *Gottenburgh* to *London* with a warranty to depart with convoy from *Fleckery*. In *July* the ship sailed from *Gottenburgh* to *Fleckery*, and there she waited for convoy two months. On the 21st of *September*, at nine in the morning, three men of war, who had an hundred ships in convoy, stood off *Fleckery* and made a signal for the ships there to come out, and likewise sent in a yawl to order them out. There were fourteen ships waiting, and the *John and Jane* got out by twelve

U

o'clock,

o'clock, and one of the first, the convoy having sailed gently on, and being two leagues a-head. It was a hard gale, and by six in the afternoon came up with the fleet, but could not get to either of the men of war for sailing orders, on account of the gale of wind. It was stormy all night, and at day-break the ship in question was in the midst of the fleet, but the weather was so bad that no boat could be sent for sailing orders. A *French* privateer had sailed amongst them all night, and the 22d, it being foggy, attacked the *John and Jane* about two, who kept a running fight till dark, which was renewed the next morning, when she was taken. For the defendant it was insisted, that this ship was not under convoy, nor is ever considered so till they have received sailing orders; and if the weather would not permit the captain to get them, he should have gone back. But the Chief Justice and jury were both of opinion, that as the captain had done every thing in his power, it was a departing with convoy; and these agreements are never confined to precise words; as in the case of departing with convoy from *London*, where the place of rendezvous is *Spithead*; a loss in going thither is within the policy. So that the plaintiff recovered. *Str.* 1250. 19 G. 2.

If a ship be insured *from* the port of *London* to *Cadiz*, and before she breaks ground is burnt, the insurers are not liable; but if the words are *at* or *from* the port of *London*, they are liable. *Molloy*, 292.

An insurance made in a foreign country, may be sued in *England* by the common law, if the assurers come here. *Id.* 295.

Insur-
ance on
prohibit-
ed goods
void.

An insurance made on prohibited goods is not binding. *Id.* 296.

An insurance on a voyage prohibited by the laws of this country is void. 1 *Doug.* 254.

Wilfully
depart-
ing from
convoy.

Where the words of the policy are "*the ship warranted to depart with convoy*," it shall be intended that she shall keep with convoy during the voyage, if possible, and if she depart wilfully from the con-
voy

voy, it is a fraud; but if having departed with convoy, and by stress of weather she loses convoy and is taken, the insurers are liable. *Carth.* 216.

2 *Salk.* 443.

If after a policy of insurance, a damage happens, and afterwards in the same voyage a deviation; yet the assured shall recover for what happened before the deviation, for the policy is discharged from the time of the deviation only. 2 *Salk.* 444.

Assurer shall recover for what happened before a deviation.

In the case of *Forster v. Wilmor*, the insurance was from *Carolina* to *Lisbon*, and at and from thence to *Bristol*: it appeared the captain had taken in salt, which he was to deliver at *Falmouth* before he went to *Bristol*; but the ship was taken in the direct road to both, and before she came to the point where she would turn off to *Falmouth*. And it was held the insurer was liable; for it is but an intention to deviate, and that was held not sufficient to discharge the under-writer. In the case of *Carter v. The Royal Exchange Assurance Company*, where insurance was from *Honduras* to *London*, and a consignment to *Amsterdam*; a loss happened before she came to the dividing point between the two voyages, which the insurers was held to pay for. *Str.* 1249. 19 G. 2.

If a ship sail on a voyage different from, although coinciding in part with that insured, the policy is discharged although the loss happen before the dividing point. 1 *Doug.* 16.

When an insured ship quits the course described in the policy, from necessity, she must pursue the new voyage of necessity, in the direct course, and in the shortest time, otherwise the policy will be discharged. 1 *Doug.* 284.

Quitting the course from necessity.

A deviation from necessity, must be justified both as to substance and manner. 1 *Doug.* 291.

Must be justified

It is a general principle that where a risk has begun, though it should cease immediately, there shall be no return of premium. 2 *Doug.* 588.

Risk begun

And where the risk never has begun, there shall be a return. *Ibid.*

Ship insured for a certain time.

If a ship is insured against capture for twelve months, at the rate of so much *per* month, making a specified gross sum, though the risk cease before the end of two months by the loss of the ship in a storm, there shall be no apportionment nor return of premium, the contract being entire. 2 *Doug.* 588. *Cowp.* 666.

Or if a ship is insured for twelve months for a gross sum, warranted free from captures, there shall be no apportionment or return, though the risk cease by the capture of the ship before the expiration of the twelve months. 2 *Doug.* 587.

So also if there is an insurance on a ship and goods—at and from *A.* to *B.* during her stay and trade there, at and from thence to her port or ports of discharge in *C.* and at and from thence back to *A.*—it is an entire contract, and if the loss happen at any time after the commencement of the risk, there shall be no apportionment nor return. 2 *Doug.* 781.

Insurance on a life for a year.

So where there is an insurance upon a life for a year, with an exception as to suicide, and the hands of justice, if the party die in either of those ways within the year, there shall be no apportionment nor return. 2 *Doug.* 785.

In what case the risk and contract are divisible.

But otherwise it is, if the policy is “at and from *London* to *Hallifax* in *Nova Scotia*, warranted to depart with convoy from *Portsmouth*.”—In this case the risk and contract are divisible, and if the ship depart from *Portsmouth* without convoy, there shall be an apportionment and return of so much as was paid for the voyage from *Portsmouth* to *Hallifax*, to be ascertained by the jury; the commencement of any risk from *Portsmouth*, depending on the condition precedent of a departure from thence with convoy, 2 *Doug.* 587. 790.

An insured ship taken and re-captured.

A ship and goods being insured for a voyage, if the ship is taken, and re-captured, and after the re-capture, the captain, acting fairly for the benefit of his employers, sells the ship and cargo, and thereby

thereby puts an end to the voyage, the insured may abandon and recover as for a total loss. 1 *Doug.* 231.

If the voyage is lost, or not worth pursuing, if the salvage is high, if the underwriter will not at all events undertake to pay that expence, the insured may abandon, notwithstanding a re-capture.

1 *Doug.* 231.

On a representation that a ship was seen safe on such a day, at a certain latitude or point in the voyage, if it turn out that she had got safe to the point represented, but was lost two days before the day mentioned, the difference (though by mistake) is material and discharges the policy. 1 *Doug.* 260.

Mistake
discharges
the policy.

Under a warranty, that the ship and cargo are neutral property, it is sufficient if they are so when the risk commences. 2 *Doug.* 732.

Neutral
property.

But if such a warranty is false, though the loss should not happen in consequence of the property not being neutral, the policy is void. 3 *Burr.* 1419. 1 *Black.* 427.

Warranty false,
makes
the policy
void.

The term "seamen" in a policy, extends to all the crew, including boys, cook, &c. 1 *Doug.* 11. *Cowp.* 785.

Who are
seamen.

Nuſances.

IF a person sets up and exercises any offensive trade, as a tanner, a tallow-chandler, and the like, in a place where they have not been used, his neighbour may have an action against him; for though these are lawful and necessary, yet they should be exercised in remote places. *Cro. Car.* 510.

Offensive
trades.

An action lies not for a common and public nuisance, for it is indictable: but if any person receives hurt

Nuſances
are public
and private.

hurt or damage in his person or property by such nuisance, he may have an action for it and recover damages. 5 Rep. 73.

Remov-
ing a nu-
sance.

Whatever unlawfully annoys or doth damage to another is a nuisance, and may be removed by the party aggrieved, *so as he doth no riot in removing it*; but if he remove it, it is not indictable. 5 Rep. 101. 9 Rep. 55.

Prevent-
ing a nu-
sance.

If one sees his neighbour erecting a nuisance, he cannot remove it till it becomes an actual nuisance. 12 Mod. Rep. 510.

If a man builds his house so close to mine, that his roof overhangs my roof, and throws the water off his roof upon mine, an action will lie. Fitz. Nat. Brev. 184.

Building.

But this may be justified by custom in *London*, by building on an old foundation to any height. Wood's Inst. 443.

Poison-
ing
streams,
&c.

If a man hath a water-course running to his house for necessary use, and a tanner erects a lime pit so near it that the water is spoiled, it is actionable. So if dye houses, &c. are erected, and the stink or filth destroy fish in a river. 2 Roll. Abr. 137.

Corrupt-
ing the
air.

An action lies for hindering the wholesome air, and also for corrupting the air, but not for intercepting a prospect. 9 Rep. 58.

Bykeep-
ing hogs,
&c.

If a person keeps his hogs or other noisome animals, so near my house that the stench incommodes me, and makes the air unwholesome, I may have an action against him. *Ibid.*

Any un-
lawful act
that in-
jures ano-
ther.

If one does any act in itself lawful, which tends necessarily to the damage of another's property, it is a nuisance, and is actionable; and it is incumbent on him to find some other place to do that act in, where it will be less offensive. 3 Black. Com. 217.

Sale of Goods, &c.

T. 33 G. 3. K. v. *Arnold*, it was adjudged in the court of King's Bench, Lord Kenyon chief justice, that the buyer of corn by any other than the *Winchester measure*, forfeits the penalty of forty shillings, besides the value of the corn so bought. M. S.

Sale, is the transferring the property of goods from one to another, upon valuable consideration: and if a bargain is, that another shall give me 5*l.* for such a thing, and he gives me earnest, which I accept, this is a perfect sale. *Wood's Inst.* 316.

If a man agree for the purchase of goods, he shall pay for them before he carry them away, unless a term of credit is expressly allowed by the seller. *Noy's Max.* 87.

Where no time is appointed for delivery of things sold, or for payment of the money, it is generally implied that the delivery be made immediately, and payment on the delivery. 3 *Salk.* 91.

If a man says the price of a horse or other thing is twenty pounds, and another says I will give you twenty pounds, but does not pay immediately: it is at the option of the seller whether he shall have it or no, except a day was given for payment. *Id.*

The property of a horse, &c. sold by bargain and contract, is in the buyer immediately; but the seller may keep the horse till he is paid for it, though he cannot bring an action for the money till the delivery, unless the horse die between the contract and the delivery. *Id.*

If a man affirms a thing sold is of such a value when it is not, this is not actionable; but if he actually

What amounts to a purchase.

The property of a horse immediately in the buyer.

Goods warranted.

actually warrants it, *at the time of the sale*, it will bear an action, being part of the contract. 2 Cro. 5, 386, 630. 1 Rol. Abr. 97.

If a man upon the sale of goods warrants them to be good, the law annexes to this warranty a tacit contract, that if they be not so, he shall make compensation to the purchaser; but the warranty must be *upon* the sale, not *after* it. Fitz. Nat. Brev. 94. Finch. L. 189. unless a new consideration arises.

Vendor knowing goods to be unsound, or disguising them.

But if the vendor knew the goods to be unsound, and hath used any art to disguise them; or if in any respect, they differ from what he represents them to be to the purchaser, he is answerable for their goodness; though no general warranty will extend to those defects that are obvious to one's senses. Finch L. 189.

If one takes up goods or wares of a tradesman, without an express agreement for a price, there the law concludes that both parties intentionally agreed, that the real value of the goods should be paid.

How far a collateral undertaking is binding.

If two persons come to a shop, and one buys, and the other to procure him credit promises the seller, "*If he does not pay you I will,*" this is a collateral undertaking, and void without writing, by the statute of frauds; but if he says "*let him have the goods, I will be your paymaster,*" this is an undertaking as for himself, and he shall be intended to be the real buyer, and the other to act only as his servant. 1 Salk. 27. 2 Term Rep. 70.

By the 29 C. 2, c. 3, upon a contract for the sale of goods of the price of 10*l.* and upwards, no action will lie, unless the buyer accept part of the goods sold, or give something in earnest to bind the bargain, or some note or memorandum in writing be made and signed by the parties to be charged with the contract, or their agents.

Giving earnest for goods.

On sale of goods, if earnest be given to the seller, and part of them are taken away by the buyer, he must

must pay the residue of the money upon fetching away the rest, because no other time is appointed; and the earnest given binds the bargain, and gives the buyer a right to demand the goods; but a demand without paying the money is void: and it has been held, that after the earnest is taken, the seller cannot dispose of the goods to another, unless there is some default in the buyer; therefore if he does not take away the goods, and pay the money, the seller ought to require him so to do; and then if he does not do it in convenient time, the bargain and sale is dissolved, and the seller may dispose of them to any other person. *1 Salk. 113.*

If a man sells me goods to be delivered at a certain day, and does not deliver them, I may have an action against him and recover damages. *4 Rep. 94.*

Goods to be delivered on a certain day.

So if he delivers them in bad and unmerchantable condition. *Dyer. 75.*

Where a person is intitled to a thing in gross, he is not obliged to accept it by parcels; thus for example, if *A.* has contracted with me for the sale of ten pipes of wine, which he is bound to deliver, and tenders me a part thereof only, I am not bound to accept it. *5 Mod. Rep. 71.*

Conditions to be complied with.

The general rule of law is, that all sales and contracts, of any thing vendible in fairs or market overt, shall not only be good between the parties; but also be binding on all those that have any right or property therein. *2 Inst. 713.*

Contracts in fairs or markets.

Though all fairs and markets are overt, yet the sale must be in some open place, as in a shop, and not in a warehouse, or other private part of the house, so that people who go along may see what is doing; and therefore if the shop door or window be so shut, that the goods cannot be seen, this alters no property. *5 Co. 83. Bishop of Worcester's case.—Cro. Eliz. 454. S. P. 8 Co. 127.*

But if my goods are stolen from me, and sold out of market overt, my property is not altered, and I may take them wherever I find them. *5 Rep. 83.*

Goods
wrong-
fully
taken.

By the 1 *Jac.* 1, c. 21, if goods are wrongfully taken, and sold or pledged to any pawnbroker in *London, Westminster, or Southwark*, or within two miles of them, the property shall not be altered thereby.

Buyer
having
any impe-
diment.

If the buyer knows the property not to be in the seller, or if there be any other fraud in the transaction; if he knows the seller to be under age, or a married woman not usually trading for herself; if the sale be not originally and wholly made in the market or fair, or not at the usual hours, the owner's property is not bound thereby. 2 *Inst.* 713, 714.

A man
buying
his own
goods.

If a man happens to buy his own goods in a fair or market, the contract shall not bind him so that he shall render the price, unless the property had been previously altered by a former sale. *Perk. f.* 93.

Original
owner
may take
goods.

Notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them if he finds them in his hands. 2 *Inst.* 713.

Sale on a
Sunday.

Exposing to sale any wares or goods on a *Sunday*, subjects the owner to a forfeiture of the goods to the poor, &c. *Stat.* 29 C. 2. c. 7.

Selling
with a
deficient
title.

If a vendor of goods sells them as his own, and his title proves deficient, the purchaser without any express warranty, may have an action, and shall recover the value. *Cro. Jac.* 474. 1 *Roll. Ab.* 90.

Sale
after a
writ of
execu-
tion
issued.

If goods are sold after a writ of execution delivered to the sheriff, the sale is considered as fraudulent; and the property of the goods, is bound to answer for the debt, from the time of the delivery of the writ. 29 C. 2. c. 3. *Skin.* 257.

Deliver-
ing goods
to be
kept.

If a person delivers goods to another to keep for his use, the receiver is not answerable if the goods are stolen without any fault in him; neither will common neglect make him chargeable, but he must be guilty of some gross neglect. 2 *Ld. Raym.* 909.

Ship.

IF a master of a ship takes goods on board to carry for hire, and the goods are spoiled, an action lies against the owners or the master, at the plaintiff's election. 3 *Lev.* 258, 259.

A master of a ship has no property, either general or special, in his being constituted, though the law considers him as an officer, who must render an account for whatsoever is put into his custody, and therefore whatever misfortunes happen, or losses occur, through negligence, wilfulness, or ignorance, in himself or mariners, he is answerable. *Hob.* 11.

Master
account-
able for
misfor-
tunes.

The law imputes offences and faults committed by the mariners, to the negligence of the master; and were it otherwise, the merchant would be in a very dangerous condition. The reasons why he ought to be responsible are, that the mariners are of his own choosing, and under his correction and government, and know no other superior on shipboard but himself; and if they are faulty, he may correct and punish them, and justify the same by law: and likewise, if the fact is apparently proved against them, may reimburse himself out of their wages. *Molloy, b. 1. c. 3. §. 13.* cites *Roll. Abr.* 533. *E. 11 Jac in B. R. Horn v. Smith.*

Account-
able for
his ma-
riners.

If his mariners go with the ship's-boat to the quay or wharf to fetch goods on shipboard; if once they have taken charge of them, the master becomes immediately responsible, if they steal, lose, damage or embezzle them. *Molloy, b. 1, c. 3. §. 15.*

If the master of a ship buys provisions for such ship, and though he has money from the owners to pay for provisions, nevertheless he takes them upon credit, and fails; the owners are liable to pay the debt, in proportion to their respective shares in the ship. 2 *Vern.* 643.

Owners
how
account-
able.

Plaintiff
may
charge
either
master or
owners.

The master of a ship, at his peril, must see that all things be forth-coming which are delivered to him, let what accident soever happen, (the act of God, or an enemy, and perils and dangers of the seas, only excepted) but for fire, thieves, and the like, he must answer; and he is in the nature of a common carrier, and though he receives a salary, yet is a known and public officer, and one that the law looks upon to answer; and the plaintiff hath his election to charge either master or owners, or both, at his pleasure, though he can have but one satisfaction. *Cro. Jac.* 330, 331. *4 Rep.* 84. *1 Mod.* 285. *3 Keb.* 72. 112. 132. 138. See CARRIERS.

The captain of a ship has no lien on such ship for wages, stores, or repairs, done in *England*. *1 Doug.* 101.

Ships
in the
Thames.

If money be laid out on a ship in the river *Thames*, either in the repairing, fitting out, new rigging, or apparel of the ship, this is no charge upon the ship, but the person thus employed, must resort to the master or owner for payment. *2 P. Wms.* 367.

Ships at
sea.

But if the ship be *at sea*, where no treaty of contract can be made with the owner, and the master employs any person to do work on the ship, or to new rig or repair the same, this for necessity and encouragement of trade is a lien on the ship, and the master by the maritime law is allowed to hypothecate the ship. *Id.*

Though the repairer of a ship may sue the master who employed him, or the owners, yet if he undertakes it, on a special promise from either, the other is discharged. *2 Str.* 816.

Master
may de-
tain
goods for
freight.

A master of a ship may keep the goods till he is paid his freight, but if he once parts with them, he cannot retake them. *12 Mod. Rep.* 511.

Usury.

Usury.

USURY, in a strict sense, is a contract upon the loan of money, to give the lender a certain profit for the use of it, upon all events, whether the borrower made any advantage of it, or the lender suffered any prejudice for the want of it, or whether it be repaid on the appointed time or not; and in a large sense it seems, that all undue advantages taken by a lender against a borrower, came under the notion of usury. *Haw. 245.*

The 12 *Ann. st. 2. c. 16.* enacts, That no person upon any contract, which shall be made, shall take for loan of any money, wares, &c. above the value of 5*l.* for the forbearance of 100*l.* for a year; and all bonds and assurances for payment of any money to be lent upon usury, whereupon or whereby there shall be reserved or taken above five pounds in the hundred, shall be void; and every person which shall receive, by means of any corrupt bargain, loan, exchange, chevivance, shift or interest of any wares, or other things, or by any deceitful way, for forbearing or giving day of payment for one year, for their money or other things, above 5*l.* for 100*l.* for a year, &c. shall forfeit the treble value of the monies or other things lent. 5*l.* per cent. interest is legal.

King's Bench, Guild-Hall, Dec. 18, 1793, *Mathews v. Griffiths and Co.* This was a *qui tam* action on the statute of usury. The defendants are bankers at *Portsmouth*, and, in several instances, had discounted bills for a Mrs. *Stewart*, the proprietor of some silk works, at thirty days, at the rate of five *per cent.* but, instead of giving cash, had given bills on *London*, at three days sight.—The fact was completely established by the evidence. Mr. *Erskine* endeavoured to defend his clients, on the ground that it was by the consent of both parties,

ties, and for the convenience of Mrs. *Stewart*. The objection was over-ruled by Lord *Kenyon*, who said he was confident it was usury, and no lawyer whatever would be of a different opinion. They ought to have deducted the discount for their bills.

But there can be no usury without an actual loan.
1 *Lutw.* 273. *Sid.* 27.

But where a person advances a sum of money, in consideration of his receiving 5*l.* *per cent.* interest, and also a third share of the profit on commission business, he shall be considered as a partner in that business. As in the case of *Boylston v. Holmes*, at Guildhall. T. 33 G. 3, which excited the attention of the commercial world, and occasioned the court to be uncommonly crowded. It was an issue directed by the Court of Chancery. The question for the opinion of the jury was, whether Mr. *Boylston* was at any time, and when, a partner in the house of Messrs. *Lane* and *Frazer*, formerly eminent merchants and underwriters, but who became insolvent.

Mr. *Law* opened the case on the part of the defendant, with whom the proof of the issue rested. He said it was not only a cause of considerable importance to a number of persons in point of value, but of great concern to the security of the commercial world. *Lane* and *Frazer* were general merchants, and transacted considerable business in the commission line. Mr. *Boylston*, who was a gentleman of considerable property, advanced to them, under an agreement, dated 3d of August, 1784, the sum of 40,000*l.* for which he was to receive not only five per cent. but one third annually out of the commission business, and to have free access to all the books of accounts; but it was expressly stipulated that he should be exempted from all losses.

Mr. *Law* then stated, that two bonds had been executed by *Lane* and *Frazer* to Mr. *Boylston*, for considerable sums; and produced several letters,
some

some entries in the partnership book, and a receipt under his hand, from all which it appeared, that Mr. *Boylston* had been what the law deemed a sleeping partner; and so he had considered and described himself in a case he laid before Mr. *Hollist*, an eminent counsel.

Several witnesses were examined, and a variety of written evidence produced and read, which clearly established the material facts cited by Mr. *Law*.

Lord *Kenyon* said, the partnership was clearly established by the reception of profits by Mr. *Boylston*. It was not a general partnership, but related only to the commission business, and was founded on the agreement made in the year 1784. His Lordship expressed his surprise at the form of the order of the Court of Chancery, directing the issue to be tried which had erroneously reversed the title of the cause, by making the person who ought to have been the defendant the plaintiff, and the plaintiff the defendant.

The jury by their verdict found Mr. *Boylston* to be a partner in the house of *Lane* and *Frazer* in the commission business only, under the agreement made in 1784.

An agreement to pay double the sum borrowed, or other penalty on the non-payment of the principal debt, at a certain day, is not usurious, because it is in the power of the borrower wholly to discharge himself, by repaying the principal according to the bargain. 1 *Haw.* 82.

So if a man lend another 100*l.* for two years, to pay for the loan 30*l.* but if he pay the principal at the year's end he shall pay nothing for the interest, this is not usury; unless the clause of redemption be mere colour. *Cro. Jac.* 509. 5 *Rep.* 69.

E. 32, G. 3. Le Grand v. Hamilton. A memorandum endorsed on a bond, which was conditioned for the payment of 100*l.* by quarterly payments of 5*l.*

5*l.* each, and at interest at 5*l. per cent.* "that at the end of each year, *the year's interest due* was to be added to the principal, and then the 20*l.* received in the course of the year was to be deducted, and the balance remain as principal," was held not to be usurious, because the intention of the parties might be to calculate the interest, at the end of the year, in the following manner:—for the first quarter, there would be interest on the whole sum; for the second, interest for the whole, minus the sum already paid; and so on for the third and fourth quarters; and whatever that interest was, it was to be added to the principal.—*Durnf. and East*, iv. 613.

Taking
a pre-
mium.

If there is an agreement to pay legal interest, and a premium is paid down over and above the interest, the agreement is usurious and void. 1 *Doug.* 235.

How qua-
lified.

But the penalty is not incurred if the premium itself does not exceed legal interest, nor till more than legal interest is actually received. *Id.*

An action may therefore be brought for the penalty, though more than a year has elapsed since the payment of the premium, if it is not a year since what has been paid exceeded legal interest. *Id.*

Goods
over-
charged
to the
borrower
instead of
money in
usury.

When upon a negotiation for a loan of money, the lender says he cannot advance the money, but will furnish goods, which the other takes and sells; if the security given is for a sum of money, greatly exceeding the value of the goods and five *per cent.* interest, this is an usurious loan, and the security and contract are both void. 2 *Doug.* 736.

Country
banker.

It is not usury for a country banker, in discounting bills to take over and above five *per cent.* discount, a commission, agreeable to the usage, on the amount of the bill. 2 *Term Rep.* 52.

Volun-
tary re-
payment
before
due does
not make

The receipt of interest before the time when it is in strictness due, being voluntarily paid by the debtor, for the greater convenience of the creditor, or for any other such like consideration, without any man-
ner

ner of corrupt practice, or any previous agreement of this kind at the making of the first contract, does not make the party liable. 1 *Haw.* 82. the lender liable.

The grant of an annuity for lives, not only exceeding the rate allowed for interest, but also exceeding the known proportion for contracts of this kind, in consideration of a certain sum of money, is not within the meaning of the statute, unless there be some underhand bargain for the security of the repayment of the principal or consideration money. *Id.* *Cro. Jac.* 253. Granting annuities on lives not usurious.

So where, in debt upon bond, the defendant pleaded the statute of usury, and that he came to the plaintiff to borrow of him 120*l.* according to the rate of 10*l.* *per cent.* who refused to lend the same, but corruptly offered to deliver 120*l.* to him, if he would be bound to pay him 20*l.* *per annum*, during the plaintiff's wife's and his son's lives: whereupon he entered into the bond. Resolved, that this, being an absolute bargain, in consideration of the payment of 20*l.* *per annum*, during two lives and no longer, and no agreement to have the principal money, was out of the statute of usury; but if there had been any provision for the re-payment of the principal, although not expressed within the bond, it had been an usurious agreement within the statute; and judgment for the plaintiff. *Cro. J.* 252.

If interest upon a bond exceeds five *per cent. per annum*, where the principal and interest are possibly in hazard, upon any contingency or casualty; or if there is a hazard that one may have less than his principal, or upon a return of a ship from sea, these are not usury. *Show.* 8. Or contracts depending upon a contingency.

Where the bargain is merely casual, and the whole depends on a contingency, the contract is not usurious. Thus, Mr. *Spencer* being in possession of an estate of 7000*l.* a year, and of a personal estate in goods and plate, &c. worth 20,000*l.* and owing about 20,000*l.* to tradesmen, being about thirty years of age, of a hale constitution, but impaired by irregu-

larity, and the Duchess of *Marlborough* his grandmother, being then seventy-eight, and of a good constitution, made the defendant a proposal, that for 5000*l.* paid down he would engage to pay 10,000*l.* if he survived the Duchess, which after some deliberation was accepted by the defendant; and Mr. *Spencer* gave him a bond for the payment of 10,000*l.* in six months after the death of the Duchess, in case he should be then living; the Duchess lived six years after, and then died, giving Mr. *Spencer* by her will a very considerable estate: Then Mr. *Spencer* confessed a judgment to the defendant for 10,000*l.* and afterwards paid him 2000*l.* in part of it, and then died, about a year and eight months after the Duchess. A bill was brought to be relieved against this demand, upon payment of the principal sum with legal interest, on account of its being an unconscionable bargain, and against the public good. The Lord Chancellor called to his assistance Lord Chief Justice *Lee*, Lord Chief Justice *Willes*, Sir *John Strange* Master of the Rolls, and Mr. Justice *Burnett*; who gave their opinions in *Hil.* term 1750, that no contract can be fraudulent within the statute, where it is not for the forbearance. There may be many contracts which this court sets aside, though not usurious, as marriage brokage bonds, place-brokage bonds, &c. but here appears no fraud or imposition in this case, and the party himself has confirmed it: this was a mere contingency, and the whole money might have been lost; it is a bargain of chance, and a mere wager, and refused the relief prayed by the plaintiffs. 5 *Bac. Abr.* 415. *Earl of Chesterfield* and others executors of Mr. *John Spencer*, against Sir *Abraham Janssen*. *MS. Rep. in Chancery*, *Trin.* 24 *Geo.* 2. *Atkyns's Rep.* 301.

But if the interest only be hazarded on such a contract, and the whole principal secured, the whole is usurious. *Cro, Jac.* 508.

It is not material whether the payment, both of the principal, and also of the usurious interest, be secured

secured by the same or by different conveyances, but all writings whatsoever for the strengthening such a contract are void. 1 *Haw.* 82.

A contract reserving to the lender a greater advantage than is allowed by the statute, is equally within the meaning of it; whether the whole be reserved by way of interest, or in part only under that name, and in part by way of rent for a house, let at a rate plainly exceeding the known value. *Cro. Jac.* 440. Collusive contract

The construction of cases of this nature, must be governed by the circumstances of the whole matter, from which the intention of the parties will appear, in making the bargain; and if it was in truth usurious, it is void, however it may be disguised by a specious assurance. 1 *Haw.* 82. 5 *Rep.* 69. Construction must be governed by the circumstances.

If a man gives a usurious bond, and tenders the whole money, yet if the party will take only the legal interest, he shall not forfeit the treble value by the statute. 4 *Leon.* 43. How to evade an usurious bond,

But though the treble value is not forfeited, unless something be taken above the legal rate; yet the contract alone voids the security. 1 *Haw.* 82.—*Cro. Eliz.* 20.

Upon an information upon the statute of usury, he who borrows the money may be a witness after he hath paid the money. 1 *Ld. Raym.* 191. 2 *Roll. Abr.* 685.

THE END.

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